Last page of docket
SHOW PROCEEDINGS AND ORDERS DATE: [03/28/88]

CASE NBR: [87101176] [CFX] CASE STATUS: [ ]
SHORT TITLE: [Don's Porta Signs, Inc.]
VERSUS [Clearwater, Florida] DATE DOCKETED: [011388]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Jan 13 1988		Petition for writ of certiorari filed.
Jan 13 1988		Appendix of petitioner Don's Porta Signs, Inc. filed.
Feb 17 1988		DISTRIBUTED. March 4, 1988
Feb 19 1988		Brief of respondent City of Clearwater in opposition filed.
Feb 25 1988		Reply brief of petitioner Don's Porta Signs, Inc. filed.
Mar 8 1988		REDISTRIBUTED. March 18, 1988
Mar 21 1988		REDISTRIBUTED. March 25, 1988
Mar 28 1988		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)
		**********

87-1176

No.

Supreme Court, U.S.
FILED
JAN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON'S PORTA SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETER J. WINDERS
(Counsel of Record)
DONALD E. HEMKE
CARLTON, FIELDS, WARD, EMMANUEL, SMITH, CUTLER & KENT, P.A.
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

Whether the court of appeals improperly exercised *de novo* review of the district court findings of fact *where the district court found in favor of the party asserting First Amendment rights.*

Whether the Eleventh Circuit panel decision conflicts with Federal Rule of Civil Procedure 52, precedent from this Court, and precedent from other courts of appeals concerning the scope of review of district court findings of fact.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the court of appeals were Don's Porta Signs, Inc., West Coast Sign Co., Ltd., Signs by Design of Florida, Inc., Norwood Leasing, Inc., Don Lewis, Inc., d/b/a International Jewelry Imports, R. W. Whittle, Inc., d/b/a Pik-a-Flik, plaintiffs-appellees; and City of Clearwater, defendant-appellant.

TABLE OF CONTENTS

Questions Presented I
Parties to the Proceedings II
Table of Contents III
Table of Authorities IV
Opinions Below 1
Jurisdiction 2
Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved 2
Statement of the Case 3
Reasons for Granting the Petition 4
Conclusion 16
Appendix 1–a
A. Stipulated motion and temporary restraining order 1–a
B. Order granting motion for preliminary injunction 6–a
C. Memorandum opinion and order granting permanent injunction 26–a
D. Court of appeals opinion 44–a
E. Court of appeals order on petition(s) for rehearing and suggestion(s) for rehearing en banc 58–a
F. City of Clearwater sign ordinance 61–a

TABLE OF AUTHORITIES

Cases

Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985) 12, 13, 15

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1984) ..... *passim*

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980) 3

City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed. 2d 480 (1986) 11

City of Rome v. United States, 446 U.S. 156, 184-187, 100 S.Ct. 1548, 1565-1567, 64 L.Ed. 2d 119 (1980) 12

County of Los Angeles v. Kling, 474 U.S. 936, 106 S.Ct. 300, 88 L.Ed. 2d 277 (1985) 14, 15

Dunagin v. City of Oxford, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed. 2d 855 (1984) 5

Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed. 2d 697 (1963) 8

Fiske v. Kansas, 274 U.S. 380, 385-387, 47 S.Ct. 655, 656-657, 71 L.Ed. 1108 (1927) 8

Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed. 2d 6 (1970) 8

Hess v. Indiana, 414 U.S. 105, 108-109, 94 S.Ct. 326, 328-329, 38 L.Ed. 2d 303 (1973) 7

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed. 2d 739 (1986) 12, 13, 15

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed. 2d 606 (1982) 12, 14, 15

Jacobellis v. Ohio, 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed. 2d 793 (1964) 8, 9

Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed. 2d 642 (1974) 7

Lindsay v. City of San Antonio, 821 F.2d 1103, 1110 (5th Cir. 1987), *application for certiorari pending*, ... U.S. ..... (1987) 5

Maine v. Taylor, 477 U.S. 131, 106 S.Ct. 2440, 2451, 91 L.Ed. 2d 110 (1986) 15

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22, 104 S.Ct. 2118, 2127 n.22, 80 L.Ed. 2d 772 (1984) 11

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973) 7-8

Monitor Patriot Co. v. Roy, 401 U.S. 265, 277, 91 S.Ct. 621, 628, 28 L.Ed. 2d 35 (1971) 8

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933, 934, 102 S.Ct. 3409, 3436-3437, 73 L.Ed.2d 1215 (1982) 7

New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed. 2d 1113 (1982) 7

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) ..... *passim*

Pennekamp v. Florida, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946) 8

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 1564, 89 L.Ed. 2d 783 (1986) 11

Planned Parenthood Association/Chicago Area v. Chicago Transit Authority, 767 F.2d 1225 (7th Cir. 1985) 10, 11

Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982) 12, 14, 15

Rankin v. McPherson, 107 S.Ct. 2891, 97 L.Ed. 2d 315 (1987) 9

Rogers v. Lodge, 458 U.S. 613, 622-623, 102 S.Ct. 3272, 3278, 73 L.Ed. 2d 1012 (1982) 12
Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54, 91 S.Ct. 1811, 1825, 29 L.Ed. 2d 296 (1971) 8
St. Amant v. Thompson, 390 U.S. 727, 732-733, 88 S.Ct. 1323, 1326-1327, 20 L.Ed. 2d 262 (1968) 8
Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1365, 22 L.Ed. 2d 572 (1969) 8
Tavoulareas v. Piro, 759 F.2d 90, 107-109, *vacated in part by* 763 F.2d 1472 (D.C. Cir. 1985) 12
Thornburg v. Gingles, 106 S.Ct. 2752, 2781 (1986) 9, 10, 12, 15
Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed. 2d 45 (1971) 9
United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 2d 746 (1948) 12
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed. 2d 129 (1969) 12

Constitutional Provisions

First Amendment, U.S. Constitution ..... *passim*
Fourteenth Amendment, U.S. Constitution 2

Statutes

28 U.S.C. § 1254 2
28 U.S.C. § 1331 3
28 U.S.C. § 1332 3
28 U.S.C. § 1343(3)(4) 3

Rules

Federal Rule of Civil Procedure 52 ..... *passim*
Supreme Court Rule 17 4

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON'S PORTA SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Don's Porta Signs, Inc., et al., petitioners herein, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on October 13, 1987.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, infra, 44-a) is reported at 829 F.2d 1051. The orders and memoranda opinions of the district court are reprinted in the Appendix hereto, pages 1-a, 6-a, 26-a.

JURISDICTION

On October 13, 1987, a panel of the court of appeals decided *Don's Porta Signs, Inc. v. City of Clearwater,* Case No. 86-3159 (Appendix 44-a). On November 25, 1987, the Eleventh Circuit denied petitioners' timely petition for rehearing and rehearing en banc (Appendix 58-a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

This case involves the First and Fourteenth Amendments to the United States Constitution and the City of Clearwater's sign ordinance. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The City's sign ordinance is reprinted in the appendix (page 61-a).

STATEMENT OF THE CASE

On August 29, 1985, the City adopted sign regulations which effectively prohibit portable signs within the City. Portable signs are used for commercial and non-commercial messages.

On October 16, 1985, petitioners (users and suppliers of portable signs) filed a complaint for damages, declaratory judgment and injunctive relief. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1343(3)(4). On October 22, 1985, the district court entered a temporary restraining order (Appendix 1-a); on November 14, 1985, a preliminary injunction (Appendix 6-a); and on February 27, 1986, a permanent injunction (Appendix 26-a). The district court, applying the four-prong test of *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980), found in a nine-page memorandum decision that the City had failed to prove that the prohibition of portable signs directly advanced substantial governmental interests and that the prohibition reached no further than necessary. The district court found that the prohibition "singles out the small businessman, non-profit organization, and political candidate."

The City appealed to the United States Court of Appeals for the Eleventh Circuit. On October 13, 1987, a panel of the Eleventh Circuit, upon a *de novo* review of the district court's factual findings, reversed the district court's judgment because it found that the record sufficiently supported the City's judgment to eliminate portable signs (Appendix 44-a). The panel reversed even though it found that the district court applied the proper legal test. On November 25, 1987, the Eleventh Circuit denied petitioners' motion for rehearing and rehearing en banc (Appendix 58-a).

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial and reoccurring importance concerning the protection of First Amendment rights and concerning the scope of review of district court findings of fact. This case involves conflict with Federal Rule of Civil Procedure 52, precedent from this Court, and precedent from other circuits (Supreme Court Rule 17.1(a)(c)). Its importance goes beyond portable signs to all cases involving the First Amendment. The opinion of the panel of the Eleventh Circuit converts courts of appeals from protectors of First Amendment rights to courts designed to ensure that persons are not afforded their First Amendment rights too broadly.

The parties' briefs in the Eleventh Circuit indicated that the dispute was entirely factual (see City Brief 1-12, 15-16, 17-33, City Reply Brief 1-20, Plaintiffs' Brief 1-15, 22-39). There was no dispute over controlling law (see City Brief 16-17, Plaintiffs' Brief 16).

On appeal to the Eleventh Circuit, petitioners pointed out that the appropriate standard of review was whether the district court's findings were clearly erroneous (Plaintiffs' Brief 18-20). The City even admitted that the issue on appeal was "[w]hether the trial court's decision that the City of Clearwater had failed to demonstrate that the City's prohibition of portable signs serves a substantial public interest and that there are no equally effective less intrusive regulations is *clearly erroneous*" and admitted that "[t]he appropriate standard of review concerning fact findings by the lower court is whether the findings of fact are clearly erroneous under Fed.R.Civ.P. 52(a)" (City Brief 1, 2, 12, 18, 26, City Reply Brief 23).

Nonetheless, the panel of the Eleventh Circuit applied a *de novo* review of the district court's findings. The

panel found, for example, that "the record sufficiently supports the *City's judgment* that the regulation of portable signs will help to eliminate visual clutter. . . ." The panel never determined that the district court's findings were clearly erroneous. Rather, in reversing the district court opinion, the panel indicated that it was "not bound by the 'clearly erroneous' standard of review in determining whether a commercial speech regulation directly advances the government's goals or is more expansive than necessary" and "ma[de] an independent examination of the whole record" (footnote 9). In determining that *de novo* review was appropriate, the panel purported to rely on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed. 2d 502 (1984); on *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1110 (5th Cir. 1987), *application for certiorari pending*, ... U.S. ..... (1987), which relied on *Bose Corporation;* and on *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed. 2d 855 (1984).[1]

In undertaking *de novo* review, the panel erred and disregarded Federal Rule of Civil Procedure 52 and controlling precedent from this Court.

This Court in *Bose Corporation* indicated that "an appellate court has an obligation to 'make an independent examination of the whole record' *so as to assure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'*" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286, 84 S.Ct. 710, 728-729, 11 L.Ed. 2d 686, 933-934 (1964)).

In *Bose Corporation* and *New York Times*, the underlying judgments were *against* the party asserting First

---

1. The portable sign companies in *Lindsay* have filed a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Amendment rights. In *Bose Corporation,* for example, the district court entered a judgment for the plaintiff on a product disparagement claim over defendant's defense that its statements were protected by the First Amendment. The court of appeals in *Bose Corporation* performed a "de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that plaintiff has indeed satisfied its burden of proof." 104 S.Ct. at 1955. This Court affirmed in *Bose Corporation,* framing the issue as whether Rule 52(a) "prescribe[s] the standard to be applied by the Court of Appeals in its review of a *District Court's determination that a false statement was made with 'actual malice'* described in *New York Times,*" and holding that the court of appeals properly applied an independent examination to protect First Amendment rights.

Here, to the contrary, the underlying judgment was *in favor of the party asserting First Amendment rights.* The rationale in *Bose Corporation* and *New York Times* for a *de novo* review when First Amendment claims are rejected is that the courts of appeals are first and foremost protectors of Constitutional rights, a role which justifies a departure from their more common role as a court of error and review. There is no such justification where the district court's judgment is *in favor* of the First Amendment assertion. In addition to disregarding the rationale of *Bose Corporation* and *New York Times,* the decision below converts the appellate court from a protector of First Amendment rights to a fact-finder designed to ensure against district courts recognizing First Amendment rights too broadly.

Bose Corporation is clear that the "independent examination" duty was designed to ensure that district courts

fully accord speakers their First Amendment rights, rather than designed to ensure that district courts do not accord speakers their First Amendment rights too broadly. As Justice Stevens noted in *Bose Corporation,*

> The Court has regularly conducted on *independent review* of the record both to be sure that the speech in question actually falls within the *unprotected* category and to confine the perimeters of any protected category within acceptably narrow limits *in an effort to ensure that protected expression will not be inhibited* . . . The principle of viewpoint neutrality . . . imposes a *special responsibility on judges whenever it is claimed that a particular communication is unprotected* . . . The requirement of independent appellate review . . . is a rule of federal constitutional law . . . It reflects a deeply held conviction that judges . . . must exercise such review *in order to preserve the precious liberties established and ordained by the Constitution* . . . Judges, as expositors of the Constitution, must independently decide *whether the evidence is sufficient to cross the constitutional threshold that bars entry of any judgment that is not supported by clear and convincing proof of "actual malice."*

That the "independent examination" in *Bose Corporation* applies only where the underlying judgment is against the party asserting First Amendment rights is also clear from the cases cited in *Bose Corporation.*[2] *The underlying*

---

2. *New York Times/Sullivan; NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 933, 934, 102 S.Ct. 3409, 3436-3437, 73 L.Ed. 2d 1215 (1982); *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed. 2d 1113 (1982); *Jenkins v. Georgia,* 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed. 2d 642 (1974); *Hess v. Indiana,* 414 U.S. 105, 108-109, 94 S.Ct. 326, 328-329, 38 L.Ed. 2d 303 (1973); *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419

(Continued on following page)

trial court judgments in all fourteen of the cases cited in the footnote and Bose Corporation were against the party asserting First Amendment rights. Some of those cases clearly express the rationale for *de novo* review in First Amendment cases. Indeed, Justice Stevens noted that *Fiske v. Kansas,* 274 U.S. 380, 385-387, 47 S.Ct. 655, 656-657, 71 L.Ed. 1108 (1927), had indicated that this Court "will review findings of fact by a State court *where a federal right has been denied* on the basis of a fact without evidence to support it. . . ." 104 S.Ct. at 1962 n.24.

> In *New York Times,* this Court noted that
> [W]e must make *an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.* 84 S.Ct. at 729.

That rationale is clearly inapplicable where, as here, the underlying district court judgment is in favor of the party asserting First Amendment rights.

In *Greenbelt Cooperative,* this Court undertook an "independent examination of the whole record" where the underlying judgment was against the party claiming First Amendment rights because the judgment "may impair the unfettered exercise of these First Amendment freedoms." 90 S.Ct. at 1541. Again, the underlying district court

---

Footnote continued—

(1973); *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 277, 91 S.Ct. 621, 628, 28 L.Ed. 2d 35 (1971); *Greenbelt Cooperative Publishing Assn. v. Bresler,* 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed. 2d 6 (1970); *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 54, 91 S.Ct. 1811, 1825, 29 L.Ed. 2d 296 (1971); *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969); *St. Amant v. Thompson,* 390 U.S. 727, 732-733, 88 S.Ct. 1323, 1326-1327, 20 L.Ed. 2d 262 (1968); *Jacobellis v. Ohio,* 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed. 2d 793 (1964); *Edwards v. South Carolina,* 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed. 2d 697 (1963); and *Pennekamp v. Florida,* 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946).

judgment here advances - rather than impairs - First Amendment rights.

Where the district court rules *against* the free speech claim, an independent review in the appellate courts is necessary to ensure that there is full protection of First Amendment rights. In *Jacobellis,* for example, this Court noted "its obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments." 84 S.Ct. at 1679. *Bose Corporation* also cited with approval *Time, Inc. v. Pape,* 401 U.S. 279, 284, 91 S.Ct. 633, 636, 28 L.Ed. 2d 45 (1971), where this Court endorsed "independent examination" where "there is a claim *of denial of rights* under the Federal Constitution." In *Pape,* this Court noted that it would review "the . . . record to determine whether it could constitutionally support a judgment" against the party asserting First Amendment rights. More recently, this Court examined the record as a whole in *Rankin v. McPherson,* 107 S.Ct. 2891, 2897 n.9, 97 L.Ed. 2d 315 (1987), where the district court judgment again was *against the party asserting the First Amendment rights.*

In no case, however, has this Court sanctioned or undertaken an independent review of the facts in the record to ensure that the trial court did not afford parties their First Amendment rights too broadly. Indeed, this Court has refused to apply *Bose Corporation* to permit *de novo* review of a decision *in favor* of an asserted Constitutional right. In *Thornburg v. Gingles,* 106 S.Ct. 2752, 2781 (1986), an appeal from a three-judge district court, the appellants relied primarily on *Bose Corporation* in arguing that the district court's ultimate conclusion of vote dilution was a mixed question of law and fact subject to *de novo* review on appeal. This Court dis-

agreed, finding that "vote dilution [was] a question of fact subject to the clearly erroneous standard of Rule 52(a)." 106 S.Ct. at 2781.

At least one court of appeals has expressly recognized that the rationale of *Bose Corporation* does not apply where the underlying judgment, like the district court judgment here, is in favor of the party asserting First Amendment rights. In *Planned Parenthood Association/Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), the district court ruled *in favor* of the party asserting First Amendment rights, as did the district court below. On appeal, the Chicago Transit Authority, the government agency seeking to restrain the asserted First Amendment rights, cited *Bose Corporation* for the proposition that the appellate court should undertake a *de novo* review of the record and that the "clearly erroneous" standard should not apply. After carefully reviewing Supreme Court precedent, the Seventh Circuit disagreed, and applied the clearly erroneous standard, noting:

> Independent appellate review of such facts assures that the suppression of protected speech—particularly unpopular or controversial speech—is not insulated from close scrutiny by the straightforward application of the clearly-erroneous rule. *The rule thus reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged.*
>
> CTA is not before this court claiming abridgement of its First Amendment rights. Its claim is, rather, that its proprietary interest in excluding PPA's message from its trains and buses has been wrongly restricted. *The doctrine of independent review has never*

> *been thought to afford special protection for the government's claim that it has been wrongly prevented from restricting speech.* Accordingly, we do not agree with CTA that the district court's factual findings should be subjected to a more exacting standard of review than the standard of Rule 52(a).

767 F.2d at 1229. Here, on the other hand, the panel would extend an exception from Fed.R.Civ.P. 52(a)—an exception this Court specially carved to protect First Amendment rights—to overturn a judgment in favor of First Amendment rights. The Eleventh Circuit's decision in both rationale and in effect is in direct opposition to and conflict with the Seventh Circuit's decision and to the decisions of this Court discussed above.

Particularly was the court of appeals' fact-finding here improper where the City had the burden of justifying the restriction. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 1564, 89 L.Ed. 2d 783 (1986). "Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force. This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed. 2d 480 (1986), *quoting Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.22, 104 S.Ct. 2118, 2127 n.22, 80 L.Ed. 2d 772 (1984).

Even where the underlying judgment is against the party asserting First Amendment rights, independent review extends only to ultimate conclusions (rather than to

separate fact determinations). *Tavoulareas v. Piro,* 759 F.2d 90, 107-109, *vacated in part by* 763 F.2d 1472 (D.C. Cir. 1985), discussing *Bose Corporation.* Here, the panel's independent review extended to factual determinations - such as whether the prohibition would improve aesthetics within the City - rather than to the ultimate conclusions - such as whether protected speech is involved.

Because the specially carved exception of *Bose Corporation* is clearly inapplicable here, the panel decision conflicts with Fed.R.Civ.P. 52(a), *Thornburg v. Gingles,* 106 S.Ct. 2752, 2781 (1986); *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed. 2d 739 (1986); *Anderson v. City of Bessemer City,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985); *Rogers v. Lodge,* 458 U.S. 613, 622-623, 102 S.Ct. 3272, 3278, 73 L.Ed. 2d 1012 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed. 2d 606 (1982); *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982); *City of Rome v. United States,* 446 U.S. 156, 184-187, 100 S.Ct. 1548, 1565-1567, 64 L.Ed. 2d 119 (1980); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed. 2d 129 (1969); and *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 2d 746 (1948).

Rule 52(a) requires an appellate court to affirm a district court's findings of fact unless clearly erroneous. Rather than review the district court's findings to determine if they were clearly erroneous, the panel, with its *de novo* fact-finding, concluded that the record sufficiently supported the City's judgment that banning portable signs would directly advance the City's interest in aesthetics.

In *Thornburg,* this Court rejected appellants' claim that *Bose Corporation* authorized *de novo* review. This

Court held that the clearly erroneous standard of Rule 52(a) applied to a finding of vote dilution.

In *Worthington,* the district court held that respondents were excluded from overtime benefits as "seamen." The court of appeals, reviewing the issue *de novo,* reversed the district court, and held that respondents were not seamen. This Court granted certiorari to consider whether the district court applied the appropriate standard of review. This Court held that the court of appeals erred and that the clearly erroneous standard of Rule 52(a) should have been applied as "in other civil bench-tried litigation in federal courts." 106 S.Ct. at 1529. Thus, Chief Justice Rehnquist wrote that the court of appeals erred, as did the Eleventh Circuit here, in "simply [making] factual findings on its own." 106 S.Ct. at 1530.

In *Anderson,* this Court held that court of appeals erred in reversing district court findings of fact in light of Fed.R.Civ.P. 52(a). This Court noted that,

> The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. 105 S.Ct. at 1511.

Yet rather than comply with *Anderson,* the panel here undertook a *de novo* review of the record to do its own independent fact-finding.

In *Pullman-Standard*, this Court also held that an appeals court improperly substituted its judgment of ultimate fact for the district court. This Court noted,

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

102 S.Ct. at 1789.

In *Inwood Laboratories*, this Court held that the court of appeals improperly rejected the district court findings where, as here, the court of appeals did not find those findings to be clearly erroneous. Justice O'Connor wrote, "[a]n appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction [and] resolve the ambiguities differently. . . ." 102 S.Ct. at 2190.

The rule against *de novo* review is so well established that this Court has summarily reversed courts of appeal going beyond the clearly erroneous review. In *County of Los Angeles v. Kling*, 474 U.S. 936, 106 S.Ct. 300, 88 L.Ed. 2d 277 (1985), this Court, in two sentences citing *Anderson*, granted certiorari and summarily reversed the court of appeals' judgment where the court of appeals failed to properly defer to the district court findings in accordance with Rule 52(a).

Not only does the panel's decision conflict with *Thornburg, Worthington, Anderson, Pullman-Standard, Inwood Laboratories,* and *Kling,* the decision creates inefficiencies in the court system and would be unfair to the parties. As Justice White explained in *Anderson,*

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'"

105 S.Ct. at 1512.[3]

The Eleventh Circuit's express adoption of a procedure of *de novo* review and independent fact-finding, where not necessary to *protect* First Amendment rights, is directly contrary to the rules and precedent of this Court and to their underlying reasoning. Not only is the petitioner entitled to the First Amendment rights he established before the trier of fact unless the trier of fact's decision is clearly erroneous, but a failure to follow such established procedure is wasteful of judicial resources.

---

3. Similarly, in *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 2451, 91 L.Ed. 2d 110 (1986), Justice Blackmun noted "the considerations underlying Rule 52(a)" included "the demands of judicial efficiency [and] the expertise developed by trial judges. . . ."

CONCLUSION

Wherefore, petitioners would request this Court to grant the petition for writ of certiorari because the Eleventh Circuit decision conflicts with Federal Rule of Civil Procedure 52, precedent from this Court, precedent from other circuits and the federal courts' traditional role in protecting First Amendment rights.

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH, CUTLER & KENT, P.A.
PETER J. WINDERS
(Counsel of Record)
DONALD E. HEMKE
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th of January, 1988, true and correct copies of the above and foregoing petition were served upon the City of Clearwater by United States mail to respondent's attorneys of record, Charles L. Siemon and William Merrill, Suite 903, 1800 Second Street, Sarasota, Florida 33577-5901, and M. A. Galbraith, Post Office Box 4748, Clearwater, Florida 34618-4748.

PETER J. WINDERS

Supreme Court, U.S.
FILED
JAN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

87 No. 1176

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON'S PORTA SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETER J. WINDERS
(Counsel of Record)
DONALD E. HEMKE
CARLTON, FIELDS, WARD, EMMANUEL, SMITH, CUTLER & KENT, P.A.
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

Appendix . . . . . .

A. Stipulated motion and temporary restraining order 1-a

B. Order granting motion for preliminary injunction. . . 6-a

C. Memorandum opinion and order granting permanent injunction. 26-a

D. Court of appeals opinion. . 44-a

E. Court of appeals order in petition(s) for rehearing and suggestion(s) for rehearing in banc 58-a

F. City of Clearwater sign ordinances. 61-a

Appendix

A. Stipulated motion and temporary restraining order

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DON'S PORTA-SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING,INC., DON LEWIS, INC. d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. LITTLE, INC., d/b/a PIK-A-FLIK,

Plaintiffs, CIVIL ACTION NO.

vs. 85-1649-Civ-T-17

CITY OF CLEARWATER,

Defendant.

STIPULATED MOTION

The Plaintiffs and Defendant, by counsel, hereby agree and stipulate to the entry of the temporary restraining order set forth below. The parties agree that by entering into this stipulation the Defendant does not in any manner waive its right to move to vacate the temporary restraining order set forth below.

/s/	/s/
Carlton, Fields, Ward, Emmanuel, Smith, & Cutler, P.A.	Alan S. Zimmet Assistant City Attorney
By Donald E. Hemke, Esq. Attorney for Plaintiffs	Attorney for Defendant

TEMPORARY RESTRAINING ORDER

THIS CAUSE came before the Court on the stipulated motion of the Plaintiffs and the Defendant for a Temporary Restraining Order, pending the hearing and determination of Plaintiffs' Motion for a

Preliminary Injunction, and the Court being fully advised in the premises and having reviewed the affidavits and Complaint filed herein, and

It appearing to the Court that, unless Defendant is temporarily restrained from enforcing the sign regulations, Plaintiffs will suffer immediate and irreparable injury and harm in the form of loss of income and goodwill in business, and the Court is of the opinion that the temporary restraining order should be issued, it is hereby,

ORDERED, that:

1. Pending hearing and determination of Plaintiffs' Motion for Preliminary Injunction, the Defendant, CITY OF CLEARWATER, be and is hereby temporarily enjoined and restrained from enforcing those provisions of its recently enacted sign regulations which

(a) prohibit portable signs from being used other than as one of the following temporary signs: specially as a political sign, real estate sign, construction sign, business opening sign, or signs announcing public, charitable, educational or religious events;

(b) prohibit permits for portable signs to be placed on the premises of establishments with an existing permanent sign; and

(c) prohibit portable signs with a surface area in excess of 32 square feet, until such time as Plaintiffs' Motion for Preliminary Injunction can be heard and determined.

2. Plaintiffs' Motion for Preliminary Injunction will be heard by this

Court at 2:00 o'clock p.m. on November 1, 1985.

3. This temporary restraining order is conditioned upon Plaintiffs filing with the Clerk of this Court no later than 5:00 p.m. on October 18th, 1985, an undertaking in the form of a bond, a certified cashier's or attorney's check, or cash, in the amount of $500.00 to secure payment of such costs and damages not to exceed such sum as may be suffered or sustained by the CITY OF CLEARWATER, if found to be wrongfully restrained hereby.

4. The temporary restraining order issued herein will expire on November 15, 1985, at 5:00 o'clock p.m., by consent of the parties hereto, unless within such time the order is extended for good cause shown, or unless Defendant consents to an extension.

5. The Defendant does not waive its right to move to vacate this temporary restraining order at any time.

DONE AND ORDERED at Tampa, Hillsborough County, Florida, this 16th day of October, 1985, at 1:52 p.m.

/s/
Elizabeth Kovachevich
UNITED STATES DISTRICT JUDGE

Copies to:

Alan S. Zimmet
Assistant City Attorney
Donald E. Hemke, Esq.

B. Order granting motion for preliminary injunction

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DON'S PORTA-SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC. d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Plaintiff(s), **CIVIL ACTION NO.**

vs. **85-1649-Civ-T-17**

CITY OF CLEARWATER,

Defendant(s).

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

For the fourth time,[4] this Court must intervene in the controversy between "little wheels" and "big wheels", and determine whether the "little wheels" will keep on rolling.

[4] Harnish v. Manatee County, 597 F. Supp. 601 (M.D. Fla. 1984); All American Sign Rentals, Inc., v. City of Orlando, 592 F. Supp. 85 (M.D. Fla. 1983); Signs, Inc., v. Orange County, 592 F. Supp. 693 (M.D. Fla. 1983).

Plaintiffs',[5] small business persons in the business of leasing or renting of portable signs to profit and non-profit organizations and other individuals, filed this complaint for damages, declaratory judgment, and injunctive relief, and a motion for preliminary injunction October 16, 1985, against the City of Clearwater. The suit challenges the constitutionality of the August 29, 1985, Land Development Code, Chapter 134, Sign Regulations, effected October 14, 1985, as unconstitutionally prohibiting commercial and non-commercial advertising and promotionals within the City via the well-known vehi-

---

5/ Don's Porta-Signs, Inc. (Don's);
West Coast Sign Co., Ltd. (West Coast);
Signs by Design of Florida, Inc. (Signs by Design);
Norwood Leasing, Inc. (Norwood);
Don Lewis, Inc. d/b/a International Jewelry Imports (Don Lewis); and
R. W. Whittle, Inc., d/b/a Pik-A-Flik (Whittle).

cle, portable signs, the "little wheels". The parties stipulated to a temporary restraining order, which was filed October 17, 1985. Oral hearing on the motion for preliminary injunction was held November 1, 1985. Final determination of this suit will be February 1986.

JURISDICTION

Jurisdiction for this action is pursuant to 28 U.S.C. § 1331 challenging specific sections of the City of Clearwater's Land Development Code, Chapter 134, Signs Regulations, as depriving Plaintiffs of their constitutional rights as protected under the First and Fourteenth Amendments to the Constitution, as well as the contracts clause.

THE REGULATIONS

The Land Development Code Sections under challenge include the: Foreword,

Statement of Purpose and the specific sections of Chapter 134, Sign Regulations.

> **FOREWORD:** The City of Clearwater is a resort community on the west coast of Florida with more than five miles of beaches on the Gulf of Mexico. This City has an economic base which relies heavily on tourism. In order to preserve Clearwater as a desirable community to live, vacation, and do business, a pleasing, visually attractive urban environment is of foremost importance. Furthermore, signage within this City is a highly contributive means by which to achieve this desired end. These Sign Regulations are prepared with the intent of enhancing the urban environment and promoting the continued well-being of Clearwater, Florida. Land Development Code, Chapter 134, Article I. Introductory Provisions, Section 134.003.
>
> **PURPOSE:** It is the purpose of this Chapter to promote the public health, safety and general welfare through a comprehensive system of reasonable, consistent, and non-discreditory sign standards and requirements. These Sign Regulations are intended to:...
>
> 3. Lessen hazardous situations, confusion, and visual clutter caused by proliferation, improper placement, illumination, animation, and excessive height, area, and bulk of signs which compete for the attention of pedestrian and vehicular traffic.
> 4. Enhance the attractiveness and economic well-being of the City of Clearwater as a place to live, vacation, and conduct business. Land Development Code, Chapter 134, Article I. Introductory Provisions, Section 134.004.

Although thirteen items are listed under the statement of purpose, Sections 3, concerning "visual blight", and Section 4, regarding "aesthetics" are of primary concern in this action.

CHAPTER 134, SIGN REGULATIONS:

1. Portable Signs shall be used only as temporary signs. Section 134.012(A)(7)(e).

2. Temporary use is limited to:

   a. Political signs. Section 134.008(A)(2).

   b. Real Estate signs. Section 134.008(A)(3).

   c. Construction signs. Section 134.008(A)(4).

   d. Signs to declare public or non-commercial civic, religious, municipal, county, state or national

celebrations or events. Section 134.008(A)(1)(c).

Portable signs are "virtually" excluded from all property since property is limited, generally, to one permitted sign. Section 134.010(A)(2)(c). The portable sign companies currently in business are excluded, since the Land Use Code's enumerated square feet per sign is less than the customary portable sign size in use.

THE STANDARDS FOR GRANTING PRELIMINARY INJUNCTION.

In ruling on a motion for preliminary injunction the Court must exercise its discretion in light of the four criteria enumerated in Local Rule 4.05(b)(4) and **United States v. Lambert**, 695 F.2d 536, 539 (11th Cir. 1983.) This Court must determine whether there is "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irre-

parable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threat and harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." 695 F.2d at 539 (citation omitted). Plaintiff must clearly carry the burden of persuasion, since a preliminary injunction is an extraordinary and drastic remedy.

In determining whether Plaintiffs' have a substantial likelihood of succeeding on the merits, this Court considers the following court specified tests for determining the constitutionality of such Ordinances. In **Signs, Inc. v. Orange County**, 592 F.Supp. 693 (M.D. Fla 1983) this Court held that a total ban on portable signs was a content-neutral prohibition, eliminating entirely a particular

medium of communication, thereby foreclosing expression of both commercial and non-commercial free speech. Although this Court recognized in Signs the governmental interests sought to be furthered by the total ban, the evidence did not demonstrate, aside from the government's asserted justification, that this ban advanced these governmental interests. Also, the government failed to establish in Signs that less drastic means were unavailable or unsatisfactory to achieve either goal. See also **All American Sign Rentals, Inc., v. City of Orlando**, 592 F.Supp. 85 (M.D. Fla. 1983); **Harnish v. Manatee County**, 597 F.Supp. 601 (M.D. Fla. 1984).

In **Metromedia Inc., v. San Diego**, 453 U.S. 490 (1981), the United States Supreme Court addressed the validity of an ordinance posing substantial prohibitions on

the erections of "outdoor advertising displays" within the city, as posing hazards and affecting aesthetics, as being facially invalid on First Amendment grounds, and as violating the due process clause of the Fourteenth Amendment. The Supreme Court held the ordinance facially invalid reaching too far into the realm of protected speech. The ordinance met constitutional requirements regarding the regulation of commercial speech. The Court restated its previously enumerated four-part test for determining the validity of government restrictions on commercial speech, as distinguished from more fully protected speech: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial govern-

mental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." 453 U.S. at 507 (citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563-66 (1980)).

As the Metromedia Court stated, non-commercial speech is "accorded a greater degree of protection than commercial speech". 453 U.S. at 513. The Supreme Court has further examined the protection afforded non-commercial speech in **Schad v. Mt. Ephraim**, 452 U.S. 61 (1981). As stated in Schad, "when a zoning law infringes upon a protected liberty, it must be narrowly drawn, and must further a sufficiently substantial governmental interest....[and] determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment". 452 U.S. at 68-69.

In the recent **Supersign of Boca Ration, Inc. v. City of Fort Lauderdale**, 766 F.2d 1528 (11th Cir. 1985) this circuit held, in addressing a First Amendment challenge to commercial speech, the four-part test of Central Hudson to have been met regarding the regulation of advertising vehicles or water craft. In both **Dills v. Cobb Co.**, 755 F.2d 1473 (11th Cir. 1985) and **Dills v. City of Marietta**, 674 F.2d 1377 (11th Cir. 1982) the government failed to meet its burden in demonstrating that the ordinance promoted alleged governmental interests, and that the restrictions were narrowly tailored to meet the claimed substantial governmental interest.

DISCUSSION

This Court determines that Plaintiffs' freedom of speech and equal protection guarantees are violated by the "essentially" total ban, rendering unnecessary any discussion by this Court of the other alleged constitutional infirmaties. This discussion follows:

The City of Clearwater Code delimits portable signs for temporary use only. Section 134.012(A)(7)(e). In the temporary use categories enunciated, it is most unlikely that portable signs will be used for either construction or real estate, thereby essentially allowing portable signs for use in political campaigns or to announce a charitable, educational or religious event or function. Section 134.008(A). Since business property is limited primarily to one permitted sign, with varying size limitations, and a portable sign is not a permitted sign, the

Code has the effect of being a "total ban" on the use of the portable sign. Being, in essence, a total ban, it is a content-neutral prohibition foreclosing commercial and non-commercial free speech. This total ban negates analysis by this Court under the first prong of the Central Hudson test, as to whether the protected speech is not misleading and concerns lawful activity. There are no allegations in the complaint that said communication was either misleading or unlawful.

The parties would concede, and it is this Court's holding in accordance with the ample precedent on the issue, that "visual glut" and "aesthetics", as set forth by the Code's Foreword and Statement of Purpose, are substantial governmental interests. Therefore, the first two prongs of the Central Hudson test have been met in this case.

Thereafter, the difficulties, indeed, do surface. As stated by this Court in Signs Inc. the record before this Court does not adequately justify the resolution's substantial curtailment of free speech. 592 F.Supp. at 696. The photographs presented to this Court, to demonstrate the "visual glut" created by the portable signs, convince this Court that a total ban on the portable signs would do very little to improve the scenes depicted, or to improve aesthetics. It was obvious from the photographs presented that a multitude of problems exist and exacerbate the problem. The photographs show old commercial structures, with varying maintenance and signage, utility poles, wires, and over-burdened usage of parking spaces demonstrating a history of poor planning and building permiting in these locations, that will not be improved

by a simple removal of a few portable signs.

The deposition testimony demonstrated that the City has not taken a comprehensive and systematic approach to this problem. The City conceded that it has one employee responsible for enforcement of sign regulations. Sporadic and undependable records are kept on actions taken by the City. Personal opinion, by the city officials, appeared to be the determination basis for concluding that the portable signs were ugly and should be removed. The Code provision regarding portable signs was apparently based on the subjective opinion of some of the officials with the City.

There is simply no showing made by the City that any sound, comprehensive approach has been made by the City to gather information on all the factors that

were actually contributing to the visual glut on particular streets, and what probable efforts would improve the aesthetics of the community. No doubt, from this Court's examination of the photographs in hand, the City, most urgently and definitely, needs to take drastic efforts to objectively examine all of the realities creating the visual unattractiveness. Honest evaluation of the steps that will be necessary to improve the community, coupled with a serious enforcement program, are needed to reach the City's objectives of eliminating "visual glut" from the streets of the city, and improving the "aesthetics" cf the community. The City has simply failed to establish exactly what it is about these portable signs that makes them more obnoxious than the other permanent signs, poorly maintained buildings, glut of utility poles and wires, and

poorly planned and thoughtout areas for parking spaces.

The City's essentially total ban on portable signs, while directed towards legitimate governmental interests, does not further those interests, nor has it been demonstrated that said interests could not be met as well by less intrusive restrictions. The regulations obviously single out the small businessman, non-profit organization, and political candidate, unfairly. Plaintiff's have met their burden showing a substantial likelihood of succeeding on the merits. This Court determines that the public interest overwhelmingly favors this Court's protection to be afforded small business persons, non-profit groups, and individuals from a denial of their rights to free expression and equal protection. The strictest scrutiny will be afforded by

this Court so as to prevent irreparable damage that may ensue. Since the City has not been adequately enforcing the "old" regulations, and has, at best, a dubious enforcement program, it is this Court's determination that there will be little harm afforded the City by this Court's maintenance of the status quo. The real challenge for the City is to develop a comprehensive plan to restore the city to the beautification it truly deserves. These restrictions will not accomplish that goal. Accordingly, it is

ORDERED that the Plaintiffs' motion for preliminary injunction be, and hereby is, **GRANTED**. No further permits are to be issued until March 1, 1986, by which time the Court will have ruled.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 14th day of November, 1985.

/s/
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:

All counsel

C. Memorandum opinion and order granting permanent injunction

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DON'S PORTA-SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC. d/b/a INTERNATIONAL JEWELRY IMPORTS, and R. W. WHITTLE, INC., d/b/a/ PIK-A-FLIK,

Plaintiff(s),

CASE NO: 85-1649-Civ-T-17

vs.

CITY OF CLEARWATER,

Defendant(s),

_____/

MEMORANDUM OPINION AND ORDER GRANTING PERMANENT INJUNCTION

For the fourth time,6/ this Court has

6/ Harnish v. Manatee County, 597 F. Supp. 601 (M.D. Fla. 1984); All American Sign Rentals, Inc., v. City of Orlando, 592 F. Supp. 85 (M.D. Fla. 1983); Signs, Inc. v. Orange County, 592 F. Supp. 693, (M.D. Fla. 1983).

addressed the issue of the constitutionality of sign regulations as applied to portable signs.

Plaintiffs',7/ small business persons in the business of leasing or renting of portable signs to profit and non-profit organizations and other individuals, filed this complaint for damages, declaratory judgment, and injunctive relief, and a motion for preliminary injunction October 16, 1985, against the City of Clearwater. The suit challenges the constitutionality of the August 29, 1985, Land Development Code, Chapter 134, Sign Regulations, ef-

7/ Don's Porta-Signs, Inc. (Don's);
West Coast Sign Co., Ltd. (West Coast);
Signs by Design of Florida, Inc. (Signs by Design);
Norwood Leasing, Inc. (Norwood);
Don Lewis, Inc. d/b/a International Jewelry Imports (Don Lewis); and R. W. Whittle, Inc., d/b/a Pik-A-Flik (Whittle).

fective October 14, 1985, as unconstitutionally prohibiting commercial and non-commercial advertising and promotionals within the City via the well-known vehicle, portable signs, the "little wheels". The parties stipulated to a temporary restraining order, which was filed October 17, 1985. Oral hearing on the motion for preliminary injunction was held November 1, 1985. Final determination of this suit is based on documentary evidence in testimonial form and memoranda filed by the parties to this action.

JURISDICTION

Jurisdiction for this action is pursuant to 28 U.S.C. §§ 1331 challenging specific sections of the City of Clearwater's Land Development Code, Chapter 134, Signs Regulations, as depriving Plaintiffs of their constitutional rights as protected under the First and Fourteen-

th Amendments to the Constitution, as well as the contracts clause.

THE REGULATIONS

The Land Development Code Sections under challenge include the: Foreword, Statement of Purpose and the specific sections of Chapter 134, Sign Regulations.

> **FOREWORD:** The City of Clearwater is a resort community on the west coast of Florida with more than five miles of beaches on the Gulf of Mexico. This City has an economic base which relies heavily on tourism. In order to preserve Clearwater as a desirable community to live, vacation, and do business, a pleasing, visually attractive urban environment is of foremost importance. Furthermore, signage within this City is a highly contributive means by which to achieve this desired end. These Sign Regulations are prepared with the intent of enhancing the urban environment and promoting the continued well-being of Clearwater, Florida. Land Development Code, Chapter 134, Article I. Introductory Provisions, Section 134.003.

> **PURPOSE:** It is the purpose of this Chapter to promote the public health, safety and general welfare through a comprehensive system of reasonable, consistent, and non-discreditory sign

standards and requirements. These Sign Regulations are intended to:...
3. Lessen hazardous situations, confusion, and visual clutter caused by proliferation, improper placement, illumination, animation, and excessive height, area, and bulk of signs which compete for the attention of pedestrian and vehicular traffic.
4. Enhance the attractiveness and economic well-being of the City of Clearwater as a place to live, vacation, and conduct business. Land Development Code, Chapter 134, Article I. Introductory Provisions, Section 134.004.

Although thirteen items are listed under the statement of purpose, Sections 3, concerning "visual blight", and Section 4, regarding "aesthetics" are of primary concern in this action.

CHAPTER 134, SIGN REGULATIONS:

1. Portable Signs shall be used only as temporary signs. Section 134.012(A)(7)(e).

2. Temporary use is limited to:

a. Political signs. Section 134.008(A)(2).

b. Real Estate signs. Section 134.008(A)(3).

c. Construction signs. Section 134.008(A)(4).

d. Signs to declare public or non-commercial civic, religious, municipal, county, state or national celebrations or events. Section 134.008(A)(1)(c).

Portable signs are "virtually" excluded from all property since property is limited, generally, to one permitted sign. Section 134.010 (A)(2)(c). The portable sign companies currently in business are excluded, since the Land Use Code's enumerated square feet per sign is less than the customary portable sign size in use.

THE STANDARDS

This Court considers the following court specified tests for determining the constitutionality of such Ordinances. In **Signs, Inc. v. Orange County**, 592 F. Supp. 693 (M.D. Fla. 1983) this Court held that a total ban on portable signs was a content-neutral prohibition, eliminating en-

tirely a particular medium of communication, thereby foreclosing expression of both commercial and non-commercial free speech. Although this Court recognized in Signs the governmental interests sought to be furthered by the total ban, the evidence did not demonstrate, aside from the government's asserted justification, that this ban advanced these governmental interests. Also, the government failed to establish in Signs that less drastic means were unavailable or unsatisfactory to achieve either goal. See also **All American Sign Rentals, Inc v. City of Orlando**, 592 F. Supp. 85 (M.D. Fla. 1983); **Harnish v. Manatee County**, 597 F. Supp. 601 (M.D. Fla. 1984).

In **Metromedia Inc. v. San Diego**, 453 U.S. 490 (1981), the United States Supreme Court addressed the validity of an ordinance posing substantial prohibitions on

the erections of "outdoor advertising displays" within the city, as posing hazards and affecting aesthetics, as being facially invalid on First Amendment grounds, and as violating the due process clause of the Fourteenth Amendment. The Supreme Court held the ordinance facially invalid reaching too far into the realm of protected speech. The ordinance met constitutional requirements regarding the regulation of commercial speech. The Court restated its previously enumerated four-part test for determining the validity of government restrictions on commercial speech, as distinguished from more fully protected speech: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2)

seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." 453 U.S. at 507 (citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563-66 (1980)).

As the Metromedia Court stated, non-commercial speech is "accorded a greater degree of protection than commercial speech". 453 U.S. at 513. The Supreme Court has further examined the protection afforded non-commercial speech in Schad v. Mt. Ephraim, 452 U.S. 61 (1981). As stated in Schad, "when a zoning law infringes upon a protected liberty, it must be narrowly drawn, and must further a sufficiently substantial governmental interest....[and] determine whether those interests could be served by means that

would be less intrusive on activity protected by the First Amendment". 452 U.S. at 68-69.

In the recent **Supersign of Boca Raton, Inc. v. City of Fort Lauderdale**, 766 F.2d 1528 (11th Cir. 1985) this circuit held, in addressing a First Amendment challenge to commercial speech, the four-part test of Central Hudson to have been met regarding the regulation of advertising vehicles or water craft. In both **Dills v. Cobb Co.**, 755 F.2d 1473 (11th Cir. 1985) and **Dills v. City of Marietta**, 674 F.2d 1377 (11th Cir. 1982) the government failed to meet its burden in demonstrating that the ordinance promoted alleged governmental interests, and that the restrictions were narrowly tailored to meet the claimed substantial governmental interest.

DISCUSSION

This Court determines that Plaintiffs' freedom of speech and equal protection guarantees are violated by the "essentially" total ban, rendering unnecessary any discussion by this Court of the other alleged constitutional infirmaties. This discussion follows:

The City of Clearwater Code delimits portable signs for temporary use only. Section 134.012(A)(7)(e). In the temporary use categories enunciated, it is most unlikely that portable signs will be used for either construction or real estate, thereby essentially allowing portable signs for use in political campaigns or to announce a charitable, educational or religious event or function. Section 134.008(A). Since business property is limited primarily to one permitted sign, with varying sign limitations, and a portable sign is not a permitted sign, the

Code has the effect of being a "total ban" on the use of the portable sign. Being, in essence, a total ban, it is a content-neutral prohibition foreclosing commercial and non-commercial free speech. This total ban negates analysis by this Court under the first prong of the Central Hudson test, as to whether the protected speech is not misleading and concerns lawful activity. There are no allegations in the complaint that said communication was either misleading or unlawful.

The parties concede, and this Court holds, in accordance with the ample precedent on the issue, that safety, economics, and aesthetics, as set forth by the Code's Foreword and Statement of Purpose, are substantial governmental interests. Therefore, the first two prongs of the Central Hudson test are met in this case.

The deposition testimony, and other evidence submitted, demonstrate that the City has not met its required burden of proof in establishing that the regulations regarding portable signs meet the purposes delineated, and do so via the least restrictive means. Regarding the safety objective, the City has one employee responsible for enforcement of sign regulations. Sporadic and undependable records are kept on actions taken by the City. No planned program of enforcement has been designed or implemented. The City concedes that an enforcement program would satisfy the City's safety objective. A total ban is not warranted.

The City has failed to establish that portable signs affect aesthetics anymore than other permanent signs, buildings, utility poles and wires, parking lots, and traffic congestion. Yet, permanent signs

are provided an extended period for actual compliance, without a total ban. No statistical evidence was presented to validate or to reliably conclude that this total ban met these purposes. The expert survey, at a cost of over $9,000.00, established that portable signs may not be the most effective advertising means for small business persons. This data was directly contradicted by small business persons who have found, through experience, portable signs to be most effective in generating business.

Another expert's report established, also, that blighting influences in the City were excess signage, overscale signs, overhead wires, excess signage on the front of buildings, unlandscaped parking lots, vacant lots, and unused buildings. The City's expert readily concluded he would eliminate portable signs entirely,

albeit his perception of the current regulations is that they are not a total ban on portable signs. Further, the expert readily admitted that portable signs are only one step in the whole signage process and that the regulation of portable signs has to be taken into concert with regulation of ALL signs. These opinions are not inconsistent with the Court's position. The City presented no evidence regarding the banning of non-commercial speech. Furthermore, the City concludes it regulations to be the least restrictive means without meaningful support for that conclusion.

Taking into consideration the significant financial investment that the City has made, in the obtaining of these "expert" opinions, this Court notes, that there is much to be said for the expert urban planner's recommendations of even

"stricter regulations" as to signage size and total elimination of portables. Yet, if the City were to "heed" the recommendations contained in the report, all fairness mandates an even-handed time period for all signs regarding the implementation of such regulations; a twelve month period for all should be sufficient. But, this is not a judicial matter; it is a legislative decision.

The City has essentially effected a total ban on portable signs. While the regulations are directed toward legitimate governmental interests, the City has failed to prove that this ban furthers those interests, nor has it been demonstrated that said interests could not be met as well by less intrusive restrictions. The regulations single out the small businessman, non-profit organization, and political candidate. As stated by this Court in

Signs Inc. the record before this Court does not adequately justify the resolution's substantial curtailment of free speech. 592 F. Supp. at 696. This Court determines the City's sign regulations applicable to portable signs are unconstitutional and enters a permanent injunction enjoining the City from enforcing those regulations regarding portable signs. Accordingly, it is

ORDERED that motion for permanent injunction be, and hereby is, **ENTERED**. Requests for attorney fees are to be submitted within (20) days from the date of this order. The Clerk is directed to enter Final Declaratory Judgment in this case.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 27th day of February, 1986.

/s/
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:

All counsel

D. Court of appeals opinion

DON'S PORTA SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., et al.,

Plaintiffs-Appellees,

v.

CITY OF CLEARWATER,

Defendant-Appellant.

No. 86-3159

United States Court of Appeals, Eleventh Circuit

October 13, 1987

Before GODBOLD and ANDERSON, Circuit Judges, and SWYGERT,* Senior Circuit Judge.

---

* Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

SWYGERT, Senior Circuit Judge:

The City of Clearwater appeals from a judgment of the district court declaring the City's regulation of portable signs to be in violation of the first amendment and granting injunctive relief. We reverse.

I.

The City of Clearwater is a resort community with several miles of beaches located on the west coast of Florida. Since the City relies heavily on tourism, preserving a visually attractive environment is of great importance to the community. On August 29, 1985, the City adopted a comprehensive Land Development Code which, among other things, regulates the location, placement, erection, alteration, extension, installation and continuation of all signs. See City of Clearwater, Fla., Land Development Code ch. 134

(1985). Section 134.004 of the Code provides that the sign regulations are designed to:

> 3. Lessen hazardous situations, confusion and visual clutter caused by proliferation, improper placement, illumination, animation and excessive height, area and bulk of signs which compete for the attention of pedestrian and vehicular traffic.
>
> 4. Enhance the attractiveness and economic well-being of the City of Clearwater as a place to live, vacation, and conduct business.

Id. § 134.004(A)(3), (4).

The portion of the sign regulations pertaining to portable signs[8] states:

> Portable Signs:
>
> a. Not more than one (1) portable sign shall be placed on any property.
>
> b. The sign and sign structure shall be positioned at least five (5) feet from all property lines.

8/ A portable sign is defined as follows:

> A sign which is: (a) neither permanently anchored to the ground nor permanently affixed to a building or structure, or (b) mounted on a trailer chassis.

City of Clearwater, Fla., Land Development Code § 137.005.

c. The sign and sign structure shall not exceed six (6) feet in height in any residential zoning district or in the Limited Office District, and shall not exceed eight (8) feet in height in any other district.

d. Any portable sign with a height in excess of three (3) feet which is strategically placed with respect to a vehicular accessway shall require the approval of the Traffic Engineer in order to ensure

that sufficient cross-visibility is afforded.

e. Portable signs shall be used only as temporary signs.

Id. § 134.012(A)(7). The plaintiffs-appellees, small businesses engaged in the leasing and renting of portable signs, and merchants who use portable signs to advertise, claim that the portable sign regulation amounts to a total ban.9/ The City does not dispute this characterization of the regulation. Shortly after the Land

---

9/ According to the complaint, the regulations effectively prohibit portable signs in three ways; (1) virtually none of the portable signs used in the City fall into the temporary use category; (2) most of the portable signs used in the City are larger than the specified size limitations; and (3) the sign regulations generally limit all properties to one permitted sign, and on most of the properties using portable signs the maximum number of signs have been erected as permanent signs.

Development Code became effective, the plaintiffs challenged the section of the ordinance pertaining to portable signs on various constitutional grounds. On February 27, 1986, the district court granted the plaintiffs a permanent injunction and declared the portable sign regulation unconstitutional under the first amendment.10/

In evaluating the plaintiffs' first amendment claims, the court applied the four-part commercial speech test set forth in Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).11/

10/ The court also found the ordinance to be in violation of the equal protection clause, apparently because of the ordinance's disparate treatment of portable and permanent signs.

11/ We note that the sign regulations contain exemptions for political and other non-commercial speech. See City of Clearwater, Fla., Land Development Code § 134.008.

Under the Central Hudson test, (1) only commercial speech which concerns a lawful activity and is not misleading is protected under the first amendment. A restriction on protected commercial speech is valid if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. 447 U.S. at 566. The parties did not dispute that the speech at issue satisfied the first prong of the test, and the court readily conceded the substantiality of the City's asserted interest in aesthetics.12/ However, the court concluded that the regulation did not directly advance the City's interest in aesthetics because the City had failed to establish that portable

12/ The City also attempted to justify the ordinance on the basis of traffic safety, but does not do so on appeal.

signs are any more unattractive than permanent signs, buildings, utility poles and wires, parking lots, or traffic congestion.13/ In addition, the court held that the City had not demonstrated that less intrusive restrictions would not serve the City's interests as well. This appeal followed.14/

II.

On appeal, the City argues that the present case is controlled by this court's

---

13/ As the court pointed out, permanent signs are given an extended period of time to comply with the sign regulations. See City of Clearwater, Fla., Land Development Code § 134.015.

14/ On the day that it granted the permanent injunction, the district court found the City in contempt for violating the court's earlier preliminary injunction. The City also appeals this contempt order. The imposition of sanctions, however, is a prerequisite for appellate review of a contempt order, see SEC v. Naftalin, 460 F.2d 471, 475 (8th Cir. 1972), and there is nothing in the record indicating that the district court ever imposed sanctions. The appeal of the contempt order therefore is dismissed.

recent decision in Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986). We agree. In Harnish, this court concluded, based upon the record before it, that a similar ban on portable signs satisfied the Central Hudson test. In so holding, the Harnish court emphasized that the governmental entity charged with the responsibility of making determinations about aesthetics must be given discretion in determining both the best method of achieving that goal and the degree of protection necessary. 783 F.2d at 1539.

In the present case, the City submitted evidence that portable signs are particularly unattractive and that their removal would enhance the visual quality of the community.15/ The district court

---

15/ See, e.g., Deposition of Michael Maxwell at 53-54, 66-68; Deposition of John Richter at 23-41. As in Harnish, there are also photographs of portable
(footnote continued)

nevertheless believed that the elimination of portable signs would not have a significant impact on aesthetics, and thus would not "directly advance" the governmental interest, because permanent signs and other visually unattractive structures would not also be immediately eliminated. As the Supreme Court observed in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511-12, 101 S.Ct. 2882, 2894-95, 69 L.Ed. 800 (1981) (plurality), however, a partial solution to a city's aesthetic problems may still directly advance the city's goals. The Constitution does not require the City to choose between curing all of its aesthetic problems or curing none at all. See also Members of the City Council v. Taxpayers for Vincent, 466 U.S.

(footnote continued from previous page) signs in the record "confirm[ing] an unsightly visual cluster." 783 F.2d at 1539 n. 4.

789, 810-11, 104 S.Ct. 2118, 2131-32, 80 L.Ed.2d 772 (1984) (upholding a ban on the posting of signs on public property); Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528, 1531 (11th Cir. 1985) (upholding an ordinance prohibiting the operation of advertising vehicles and watercraft); Lindsay v. City of San Antonio, 821 F.2d 1103, 1110 (5th Cir. 1987) (upholding a ban on portable signs). Moreover, the regulation of portable signs is but one aspect of the City's comprehensive effort to improve the City's appearance and should not be viewed in isolation. In light of these principles, as well as the deference to the City dictated by Harnish, we conclude that the record sufficiently supports the City's judgment that the regulation of portable signs will help to eliminate visual clutter and thereby further the City's interest in

improving the visual character of the City.16/

Harnish also compels us to conclude that the regulation is no more extensive than necessary to accomplish the City's goals. In Harnish, this court held that, in the absence of evidence in the record indicating that less restrictive means exist to achieve the government's aesthetic goals, a total ban on portable signs satisfied the fourth prong of the Central Hudson text. 783 F.2d at 1540. The plaintiffs in the present case suggest that the City's aesthetic goals could instead be accomplished by more stringent enforcement of the City's prior portable sign regulations, or by the elimination of portable signs in residential areas only. However, as the Supreme Court recognized in Metromedia, "[i]f the city has a sufficient basis for believing that billboards . . . are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." 453 U.S. at 508, 101 S.Ct. at 2893. See also Supersign, 766 F.2d at 1532; Lindsay, 821 F.2d at 1111. Similar reasoning applies to the aesthetic problems caused by portable signs.17/

16/ In cases involving first amendment claims, an appellate court must make an independent examination of the whole record. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed. 502 (1984). We therefore agree with the Fifth Circuit's conclusion in Lindsay, 821 F.2d at 1107, that an appellate court is not bound by the "clearly erroneous" standard of review in determining whether a commercial speech regulation directly advances the government's goals or is more extensive than necessary. See also Dunagin v. City of Oxford, 718 F.2d 738, 748 n. 8 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984).

17/ Because the regulation passes muster under the Central Hudson test, the
(footnote continued)

The judgment of the district court is reversed.

E. Court of appeals order on petition(s) for rehearing and suggestion(s) of rehearing in banc

---

(footnote continued from previous page) plaintiffs' claim that the regulation violates the equal protection clause by discriminating between types of signs fails as well. See Posadas de Puerto Rico Assoc. v. Tourism Co., ____ U.S. ____, 106 S. Ct. 2968, 2979 n. 9, 92 L.Ed.2d 266 (1986).

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-3159

DON'S PORTA-SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., ET AL.,

Plaintiffs-Appellees,

versus

CITY OF CLEARWATER,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion 10/13/87, 11th Cir., 198_,F.2d__)

(Nov. 25, 1987)

Before ANDERSON, Circuit Judge, GODBOLD, Senior Circuit Judge, and SWYGERT*, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor

other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

*Hon. Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit sitting by designation.

F. City of Clearwater Sign Ordinance

TITLE XI - LAND DEVELOPMENT CODE

TABLE OF CONTENTS

CHAPTER 134. SIGN REGULATIONS

Article 1. Introductory Provisions **Page**

Section 134.001 - Title 134-1.
Section 134.002 - Authorization 134-1.
Section 134.003 - Foreword 134-1.
Section 134.004 - Purpose 134-3.
Section 134.005 - Applicability and Scope 134-3.
Section 134.006 - Key Definitions 134-3.

Article II. Sign Standards

Section 134.007 - General Requirements 134-4.
Section 134.008 - Exempt Signs 134-5.
Section 134.009 - Prohibited and Restricted Signs 134-9.
Section 134.010 - Signs Requiring Permits 134-11.
Section 134.011 - Special Purpose Signs (Requiring (Permits) 134-22.
Section 134.012 - Sign Types 134-23.

Article III. Administrative Provisions

Section 134.013 -	Permits	134-28.
Section 134.014 -	Inspections	134-31.
Section 134.015 -	Nonconforming Signs	134-32.
Section 134.016 -	Abandoned Signs	134-34.
Section 134.017 -	Illegal Signs	134-35.
Section 134.018 -	Interpretation and Variance	134-36.

CHAPTER 134. SIGN REGULATIONS

Article I. Introductory Provisions

Section 134.001 - Title

A. This Chapter shall be known and may be cited as Chapter 134 Sign Regulations of Title XI - Land Development Code and may hereinafter be referred to as "this Chapter" or "these Sign Regulations".

Section 134.002 - Authorization

A. This Chapter is adopted pursuant to municipal home rule police powers and is designed to be consistent with the Local Government Comprehensive Plan adopted pursuant to Section 163.3161, Florida Statutes, and related sections.

Section 134.003 - Foreword

A. The City of Clearwater is a resort community on the west coast of Florida with more than five miles of beaches on the Gulf of Mexico. This City has an economic base which relies heavily on tourism. In order to preserve Clearwater as a desirable community to live, vacation and do business, a pleasing, visually attractive urban environment is of foremost importance. Furthermore, signage within the City is a highly contributive means by

which to achieve this desired end. These Sign Regulations are prepared with the intent of enhancing the urban environment and promoting the continued well-being of Clearwater, Florida.

Section 134.004 - Purpose

A. It is the purpose of this Chapter to promote the public health, safety and general welfare through a comprehensive system of reasonable, consistent and nondiscriminatory sign standards and requirements. These Sign Regulations are intended to:

1. Enable the identification of places of residence and business.
2. Allow for the communication of information necessary for the conduct of commerce.
3. Lessen hazardous situations, confusion and visual clutter caused by proliferation, improper place-

ment, illumination, animation and excessive height, area and bulk of signs which compete for the attention of pedestrian and vehicular traffic.

4. Enhance the attractiveness and economic well-being of the City of Clearwater as a place to live, vacation, and conduct business.
5. Protect the public from the dangers of unsafe signs.
6. Permit signs that are compatible with their surroundings, aid orientation and preclude placement in a manner that conceals or obstructs adjacent land uses or signs.
7. Encourage signs that are appropriate to the zoning district in which they are located and con-

sistent with the category of use to which they pertain.

8. Curtail the size and number of signs and sign messages to the minimum reasonably necessary to identify a residential or business location and the nature of any such business.
9. Establish sign size in relationship to the scale of the lot and building on which the sign is to be placed or to which it pertains.
10. Preclude signs from conflicting with the principal permitted use of the site or adjoining sites.
11. Regulate signs in a manner so as to not interfere with, obstruct vision of or distract motorists, bicyclists or pedestrians.

12. Require signs to be constructed, installed and maintained in a safe and satisfactory manner.
13. Preserve the natural and scenic characteristics of this waterfront resort community.

Section 134.005 - Applicability and Scope

A. These Sign Regulations shall apply to the location, placement, erection, alteration, extension, installation or continuation of any sign as hereinafter set forth.

B. Every sign shall comply with all other applicable ordinances and regulations of the City, including the Building Code and this Land Development Code. In the case of a conflict between the provisions of this Chapter and any other applicable provision of law, the more restrictive shall govern.

Section 134.006 - Key Definitions

A. The following selected definitions are fundamental to promote a basic understanding of this Chapter and are provided for the user's ease of reference. A broader listing of definitions contained in Chapter 137, Section 137.005, shall supplement this selected list and be used as is necessary and appropriate to resolve a particular issue which may arise through the reading and application of these Sign Regulations.

1. Identification Sign - A sign usually displayed for the purpose of primary property or business identification purposes and usually limited to four (4) words or less to enable ease of identification, readability and legibility, but which sign may be used for any

communication purpose and may contain any number of words.

2. Sign - Any writing, picture, symbol, banner or other graphic communication or device which is primarily used to convey information, attract attention, or advertise and is prominently visible from an outdoor location.

3. Sign Structure - The supports, uprights, braces and frame of a sign.

4. Surface Area - The rectangular, trapezoidal, triangular, circular or semicircular area of a sign which fully encompasses all extremities of the sign, exclusive of supports, uprights, braces and frame. For the purpose of determining the surface area of a sign placed directly on a wall, only

that part of the wall which is integral to the sign shall be computed as surface area.

Article II. Sign Standards

Section 134.007 General Requirements

A. Every sign erected, placed, altered, relocated, or maintained in the City of Clearwater shall be subject to the following regulations:

1. No sign or its effect shall create a traffic or fire hazard or interfere with the free and unobstructed use of public streets or sidewalks.

2. No sign shall be erected or maintained at any location in such a manner as to obstruct free and clear vision at the intersection of any streets, drives or other public or private vehicular accessways. No sign shall be

erected or maintained at any location where, by reason of the position, illumination, shape or color, it may interfere with, obstruct the view of or be confused with any authorized traffic sign, signal, or device, nor shall it make use of the words "STOP", "LOOK", "DANGER" or any other word, phrase, symbol or character in such a manner as to interfere with, mislead or confuse traffic.

3. The lowest rung of any permanent ladder attached to a sign or support structure shall be located a minimum vertical distance of ten (10) feet above existing grade.

4. All signs shall be kept in good condition, present a neat appearance, and be maintained in a good state of repair. Any sign which

is damaged or destroyed in excess of fifty (50) percent of its replacement cost shall be immediately removed by the owner of the sign or the owner of the property.

5. Weeds and debris shall be kept cut or cleared in the immediate area of all signs.

6. No sign shall be attached to or placed against a building in such a manner as to prevent ingress or egress through any door or window of any building, nor shall any sign obstruct or be attached to a fire escape.

7. The light from any illuminated sign shall be so shielded and directed that not more than three (3) footcandles of light intensity can be measured at any location on an adjoining residential property

nor more than five (5) footcandles of light intensity measured at any location on an adjoining nonresidential property.

Section 134.008 - Exempt Signs

A. In addition to the signs which are allowed within the City in accordance with other sections of these Sign Regulations, the following enumerated signs shall also be allowed and shall be exempt from the permitting requirements and procedures contained in this Chapter:

1. Governmental, Official and Other Public Signs. Governmental, official and other public signs may be placed for the following purposes without a permit:

   a. Public and Official notices posted by government officials

in the performance of their duties.

b. Signs for the control or direction of traffic and other appropriate public purposes.

c. Signs placed on public land for declared public or non-commercial civic, religious, municipal, county, state or national celebrations or events as authorized by and under such conditions as prescribed by the City Commission or City Manager.

2. Political Signs. Temporary political signs may be placed without a permit in accordance with the following:

a. Political signs may be displayed for sixty (60) days prior to an election or refer-

endum and shall be removed within seven (7) days following the election or referendum.

b. Prior to erecting political signs which pertain to a local election, candidates or their representatives shall notify the Development Code Administrator of their intent to erect such signs and shall submit a letter acknowledging their familiarity with and understanding of the requirements of this Section.

c. Political signs in residential, office and institutional zones shall have a cumulative surface area not exceeding six (6) square feet per property and such signs in commercial

and industrial zones shall have a cumulative surface area not exceeding twenty-four (24) square feet per property.

d. No political sign shall be placed or deposited within any public right-of-way or on any tree, pole, post, meter or similar object found within the public right-of-way. Any political sign placed in the public right-of-way in violation of this provision may be removed immediately by an officer of the Police Department, the Development Code Administrator, the Traffic Engineer, or other authorized City personnel. Any sign so removed may be disposed of

without notice or compensation.

e. Candidates or their representatives shall remove all political signs within seven (7) days following the election or referendum. Failure to do so shall constitute a violation of this Development Code.

3. Real Estate Signs. "Open for Inspection", "For Sale", "For Lease", "For Rent", "Sold", "Model Home", or similarly worded real estate signs may be erected without a permit as a temporary sign and all such signs shall be removed within two (2) weeks after a sale has been consummated. Not more than one (1) real estate sign may be displayed per street front-

age per property. The maximum surface area for real estate signs shall be as follows:

a. Six (6) square feet for residentially zoned properties containing less than eight (8) dwelling units.

b. Sixteen (16) square feet for residentially zoned properties and new residential subdivisions containing eight (8) or more dwelling units.

c. Thirty-two (32) square feet for undeveloped residentially zoned properties which are one (1) acre or more in size.

d. Sixteen (16) square feet for non-residentially zoned properties which are less than one (1) acre in size.

e. Thirty-two (32) square feet for non-residentially zoned properties which are one (1) acre or more in size.

4. Construction Signs. A temporary sign displaying the name of a construction company, contractor, builder, architect, engineer, or like message may be erected without a permit in accordance with the following:

a. The property upon which the sign is located shall be the subject of a valid building permit.

b. Such signs shall be limited to one (1) sign per street frontage and shall have a surface area not exceeding sixteen (16) square feet in residential districts and thirty-two

(32) square feet in nonresidential districts.

c. All signs shall be removed prior to the issuance of a certificate of occupancy/use for the development (or phase thereof) to which the sign applies.

5. Temporary Window Signs. Signs of a nonpermanent nature designed to advertise a special event, sale, product or service and in no event to remain in place for more than thirty (30) days may be placed on the interior of any first floor window without a permit provided the surface area of all such signs does not exceed fifty (50) percent of the area of the window in which the signs are displayed.

6. Occupant Signs. One (1) sign displaying the occupant's name may be placed per residential dwelling unit without a permit, the surface area of which shall not exceed two (2) square feet.

7. Address Signs. One (1) sign displaying the street number and/or address shall be placed on all developed properties in accordance with the terms contained in Chapter 111 of the Code of Ordinances. The surface area of such signs shall not exceed two (2) square feet in residential zones and eight (8) square feet in nonresidential zones. No permit shall be required.

8. Warning Signs. "No Soliciting", "No Trespassing", "Beware of Dog", and similarly worded warning signs

which have a surface area not exceeding two (2) square feet may be placed without a permit.

9. Directional Signs. Signs which contain no advertising and are placed for the purpose of directing the public solely for the convenience of the public (such as to direct traffic, identify restrooms, indicate parking areas or spaces, denote freight entrances or service areas, and like signs) and which have a surface area not exceeding three (3) square feet may be placed without a permit.
10. Memorial Signs. One (1) memorial sign having a surface area not exceeding four (4) square feet may be placed without a permit on a building or like improvement for

the purpose of officially citing the name and date of construction.

11. Recognition Signs. Recognition signs may be placed upon the approval of the City Commission to cite individuals for extraordinary public donations or service. Such signs shall have a surface area not exceeding one (1) square foot.
12. Stadium Signs. Nonelectrical signs placed within stadiums which face inward toward the playing field may be placed without a permit.
13. Vehicle Signs. Signs affixed flush against vehicles and vehicle-top political signs may be placed without a permit. Such signs shall be displayed only in accordance with all applicable terms of this Development Code.

14. Commemorative Signs. Signs which commemorate religious holidays may be displayed during a period of time beginning thirty (30) days before and terminating fifteen (15) days after the holiday without a permit.

15. Menu Signs. A menu having a surface area not exceeding two (2) square feet may be displayed in the window of a restaurant without a permit.

16. Garage/Yard Sale Signs. One (1) garage or yard sale sign having a surface area not exceeding six (6) square feet may be displayed per property for a single time period not longer than four (4) days in any one hundred twenty (120) day period.

17. Machinery Signs. Signs customarily affixed to newspaper machines, gas pumps, vending machines and public telephones may be displayed without a permit.

18. Flags. One (1) flag may be placed on any residentially zoned property and up to two (2) flags may be placed on any non-residentially zoned property without a permit. Such flags shall represent a governmental unit or body and shall be positioned so that no part of the flag is able to encroach over a public right-of-way.

Section 134.009 - Prohibited and Restricted Signs

A. The following signs shall be specifically prohibited or restricted in use as hereinafter provided:

1. No sign shall be erected or maintained on public land except those erected in accordance with these Sign Regulations and with the authorization of the appropriate public authority which owns the property.
2. No sign shall be erected or maintained in over or upon any street or railroad right-of-way, except for those signs which may be so specifically permitted by these Sign Regulations. This prohibition shall broadly include any poster, placard, notice, sticker or other sign placed in any manner on any sidewalk, pavement, parking meter, telephone or utility pole, hydrant, bridge or like structure within a right-of-way. Any such sign illegally placed may be re-

moved immediately by an officer of the Police Department, the Development Code Administrator, the Traffic Engineer, or other authorized City personnel. Any sign so removed may be disposed of without notice or compensation.

3. No sign shall be attached to or placed on any tree.
4. No sign shall be attached to or placed on a vehicle that is parked primarily for the purpose of displaying such sign. This provision is not to be construed to prohibit the identification of a business or its principal products on a vehicle operating during the normal course of business or parked temporarily at a location other than the site where the business is located (provided such location

conforms to all other applicable requirements of this Development Code and law). Neither shall this be construed to prohibit the identification of a vehicle which is for sale.

5. Wind devices (such as banners, pennants, streamers, spinners, ribbons and balloons), strips or strings of lights, and similar displays used to draw attention to a use or outline property lines or display areas shall be prohibited. This prohibition shall not apply to declared public or noncommercial civic, religious, municipal, county, state or national celebrations or events as authorized by and under such conditions as prescribed by the City Commission or City Manager.

6. No sign shall be placed on waterfront property which is primarily designed or positioned to be viewed from or across the waterway.
7. No sign shall be constructed or maintained in any manner which causes static electricity or otherwise interferes with radio or television reception.
8. No spot, beacon or floodlight shall be permitted in any area within the City for the purpose of sales attraction.
9. Signs illuminated by intermittent, flashing or moving lights shall be prohibited, except that time and temperature signs shall not be so restricted.
10. Mobile or moving signs (including those of which all or any part of

the sign moves or appears to move) shall be prohibited in all zoning districts.

11. No sign shall be painted, placed or otherwise affixed on or to the roof of any building or structure.
12. No sign shall be permitted which takes the form of a three-dimensional model (such as an animal or a piano).
13. No sign shall be placed in any residential district which promotes products or services, other than real estate signs, construction signs, vehicle signs, garage sale signs, and signs for nonconforming nonresidential uses.

Section 134.010 - Signs Requiring Permits

A. In addition to the signs which may be placed without a sign permit, the following enumerates by zoning district

those signs which may be placed upon the issuance of a sign permit. Only signs so enumerated shall be permitted and only in accord with the prescribed limitations on sign number and size.

1. The following sign regulations apply to the zones enumerated below:

   Single Family Residential "Two" District.

   Single Family Residential "Four" District.

   Single Family Residential "Six" District.

   Single Family Residential "Eight" District.

   Multiple Family Residential "Eight" District.

   Multiple Family Residential "Twelve" District.

Multiple Family Residential "Sixteen" District.

Multiple Family Residential "Twenty" District.

Multiple Family Residential "Twenty-four" District.

Multiple Family Residential "Twenty-eight" District.

Mobile Home Park District.

Residential Planned Development District.

a. Subdivision Signs. One (1) sign shall be permitted per platted residential subdivision. The surface area of the sign shall not exceed twenty-four (24) square feet and shall be limited to displaying the name, motto and/or insignia of the subdivision. Additional subdivision signs shall

be permitted for properties which qualify under the terms of recital "c".

b. Multiple Family and Mobile Home Park Signs. One (1) sign shall be permitted per property developed with eight (8) or more dwelling units located within a multiple family residential development or a mobile home park. The surface area of the sign shall not exceed twenty-four (24) square feet and shall be limited to displaying the name, motto and/or insignia of the development or park. Additional multiple family and mobile home park signs shall be permitted for properties which

qualify under the terms of recital "c".

c. Additional Subdivision, Multiple Family and Mobile Home Park Signs. Additional subdivision, multiple family and mobile home park signs shall be permitted for properties which front on two (2) or more major thoroughfares as designated on the Thoroughfare Plan. Specifically, one (1) sign shall be permitted per such frontage and each sign shall have a surface area not exceeding the limitations prescribed in preceding recitals "a" and "b".

d. Signs for Nonconforming Uses. One (1) identification sign shall be permitted for any

nonconforming nonresidential use, the surface area of which shall not exceed twenty-four (24) square feet.

2. The following sign regulations apply to the zones enumerated below:

Limited Office District.

General Office District.

Office Planned Development District.

Neighborhood Commercial District.

Resort Commercial "Twenty-four" District.

Resort Commercial "Twenty-eight" District.

General Commercial District.

Highway Commercial District.

Commercial Center District.

Commercial Planned Development District.

Eastern Corridor of the Urban Center District.

Limited Industrial District.

Industrial Planned Development District.

Public/Semi-Public District.

Open Space/Recreation District.

Recreation Planned Development District.

a. Property Identification Signs. One (1) identification sign of any type shall be permitted per property, the maximum surface area of which shall be determined according to the zoning classification assigned to the property and according to the specifications prescribed hereunder. All surface areas identified below shall be permitted to double

where the sign used is a wall sign.

(1) Within Limited Office, Open Space/Recreation and Recreation Planned Development Districts a maximum surface area of twenty-four (24) square feet shall apply.

(2) Within Public/Semi-Public Districts a maximum surface area of forty-eight (48) square feet shall apply.

(3) Within Neighborhood Commercial, Resort Commercial "Twenty-four" and Twenty-eight", General Office and Office Planned Development Districts a maximum surface area of

fifty-six (56) square feet shall apply.

(4) Within General Commercial, the Eastern Corridor of the Urban Center, Limited Industrial and Commercial and Industrial Planned Development Districts a maximum surface area of sixty-four (64) square feet shall apply.

(5) Within Highway Commercial Districts a maximum surface area of one hundred twelve (112) square feet shall apply.

(6) Within Commercial Center Districts a maximum surface area shall apply as follows:

(a) Eighty-four (84) square feet for properties developed with less than fifty thousand (50,000) square feet of gross leasable floor area.

(b) One hundred twenty (120) square feet for properties developed with fifty thousand (50,000) to one hundred thousand (100,000) square feet of gross leasable floor area.

(c) One hundred fifty-six (156) square feet for properties developed with one hundred thousand

(100,000) to two hundred thousand (200,000) square feet of gross leasable floor area.

(d) One hundred ninety-two (192) square feet for properties developed with more than two hundred thousand (200,000) square feet of gross leasable floor area.

b. Additional Property Identification Signs. Additional property identification signs shall be permitted for properties which front on two (2) or more major thoroughfares as designated on the Thoroughfare Plan. Specifically, one (1)

sign shall be permitted per such frontage per property and each sign shall have a surface area not exceeding the limitations prescribed in preceding recital "a".

c. Business Identification Signs. Individual business establishments shall be permitted identification signs in accordance with the limitations prescribed hereunder. All such signs shall be wall signs, projecting signs or canopy signs.

(1) Freestanding Business Establishments. One (1) identification sign shall be permitted per freestanding business establishment, the surface

area of which shall not exceed fifteen (15) square feet.

(2) Shopping Centers. Any property developed with a shopping center shall be permitted identification signs in accordance with the following:

(a) One (1) identification sign shall be permitted per business establishment, the surface area of which shall not exceed one and one-half (1.5) square feet per lineal foot of building width of the business, such width to be measured

on the face of the building where the sign is to be placed. Major tenants shall have a maximum sign surface area of one hundred twenty-eight (128) square feet; all other tenants shall have a maximum sign surface area of forty-eight (48) square feet.

(b) Additional signs shall be permitted to suspend downward from the soffits of covered walkways adjoining storefronts. Specifi-

cally, one (1) sign shall be permitted to identify each business entry, the surface area of which shall not exceed six (6) square feet.

(c) Additional signs shall be permitted for major tenants having multiple primary entrances from different building frontages (i.e., from different directions). In particular, one (1) additional identification sign shall be permitted per such

frontage; however, not more than two (2) additional signs shall be allowed for any tenant. The surface area of the sign shall not exceed one and one-half (1.5) square feet per lineal foot of building width of the business, such width to be measured on the face of the building which entitles the tenant to the additional sign. The sign shall be placed on or from such building face (or on a canopy af-

fixed to the building face). The maximum sign surface area shall be one hundred twelve (112) square feet.

(3) Office Complexes. One (1) identification sign shall be permitted per business establishment (i.e., per use), the surface area of which shall not exceed four (4) square feet per office.

(4) Commercial and Industrial Complexes. One (1) identification sign shall be permitted per business establishment, the surface area of which shall not exceed one and one-

half (1.5) square feet per lineal foot of building width of the business. The building width shall be measured on the face of the building where the sign is to be placed. The maximum surface for any sign shall be forty-eight (48) square feet.

d. Additional Signs for Generous Street Frontage. Additional identification signs shall be permitted for properties with generous public street frontage for the purpose of marking principal driveway entrances to the property. Specifically, one (1) sign shall be permitted per five hundred (500)

foot increment of continuous frontage, with the total number of signs placed not to exceed the number of driveways. Each sign shall be a ground sign with a surface area not exceeding twenty-four (24) square feet and shall be placed in proximity to a driveway.

e. Building Identification Signs. Any property developed with two (2) or more buildings cumulatively containing a gross floor area in excess of fifty thousand (50,000) square feet shall be permitted one (1) identification sign per building, the surface area of which shall not exceed forty (40) square feet.

f. Window Signs. Permanent signs shall be permitted in windows with a cumulative surface area not exceeding fifteen (15) percent of the area of the window in which they are displayed.

g. Directory Information Signs. Directory information signs shall be permitted to be placed on properties developed with three (3) or more buildings containing an overall gross leasable floor area in excess of fifty thousand (50,000) square feet for the purpose of orienting and guiding pedestrians or motorists throughout the site. The surface area of any such sign shall not exceed twenty (20)

square feet and shall incorporate and prominently display a map or like graphic designed to increase the sign's effectiveness. Such signs shall be positioned at least fifty (50) feet from all property lines.

h. Signs for Subdivisions, Multiple Family Development and Mobile Home Parks. Signs for subdivisions, multiple family residential development and mobile home parks shall be permitted as set forth in preceding recital "1" for the residential zoning districts.

3. The following sign regulations apply to the zones enumerated below:

Beach Commercial District.

Core of the Urban Center District. Bayfront of the Urban Center District.

a. Until any special sign review provisions are adopted by the City Commission, signs in the Beach Commercial District and the Bayfront and Core subdistricts of the Urban Center District shall be as follows:

(1) One (1) identification sign shall be permitted per property, the surface area of which shall not exceed two (2) square feet per lineal foot of building width nor forty-eight (48) square feet.

(2) Additional identification signs shall be permitted

for properties which front on two (2) or more public street rights-of-way. Specifically, one (1) sign shall be permitted per such frontage per property, the surface area of which shall not exceed two (2) square feet per lineal foot of building width nor forty-eight (48) square feet.

(3) Additional identification signs shall be permitted for properties with generous public street frontage for the purpose of marking principal driveway entrances to the property. Specifically,

one (1) sign shall be permitted per five hundred (500) foot increment of continuous frontage, with the total number of signs placed not to exceed the number of driveways. Each sign shall be a ground sign with a surface area not exceeding twenty-four (24) square feet and shall be placed in proximity to a driveway. Each sign shall be a ground sign with a surface area not exceeding twenty-four (24) square feet and shall be placed in proximity to a driveway.

(4) One (1) sign shall be permitted in proximity to any building entry which serves two (2) or more individual business establishments. Such sign shall be a wall sign having a surface area not exceeding six (6) square feet and shall identify only the names and addresses of the individual business establishments or business practitioners.

(5) Any building with a height of one hundred eighty (180) feet or more located within the Core subdistrict shall be permitted to be marked with

two (2) signs displaying the name of the building. Such signs shall be wall signs located on different building faces at least one hundred sixty (160) feet above grade and shall have a surface area not exceeding three hundred (300) square feet.

(6) Identification signs shall be permitted in first floor windows, the surface area of which shall not exceed fifteen (15) percent of the window area in which they are displayed.

b. Special sign review provisions may be established for these

districts after public hearing by the City Commission and establishment of a process to encourage the appropriate and compatible design and placement of signs and to provide for the evaluation of the less easily quantified aspects of the design process in these two unique and important districts. It shall be the purpose and intent of such special sign review process to encourage signs which are legible in the circumstances in which they are seen, compatible with their surroundings, appropriate to the type of activity to which they are located.

c. Design review criteria for any design review process established by the City Commission for the Beach Commercial and the Bayfront and Core subdistricts of the Urban Center District shall include consideration of the following:

(1) As far as possible, architectural features such as windows, cornices, pilasters and like structural or ornamental features shall not be covered by signs.

(2) Sign panels and graphics shall align with, be in proportion to, and complement architectural features throughout the district.

(3) Signs for a number of enterprises in a single building shall be of uniform height and placement, and be otherwise coordinated.

(4) Layout shall be orderly, and graphics shall be of simple shape, such as rectangular, circular or an oval.

(5) Lettering shall be appropriate to the space available and distance from which it is to be viewed.

(6) No more than two (2) type faces shall be used on any one sign or group of signs indicating one message.

(7) Individually mounted letters shall be preferable to painting on a panel.

(8) The number of colors shall be limited and carefully integrated with the design.

(9) Illumination shall be consistent with the character of the sign and surroundings.

(10) Only white light shall be permitted to illuminate or be used in conjunction with a permitted sign.

(11) Each sign shall be designed to provide maximum legibility in its particular surroundings and include the minimum number of items of informa-

tion (symbol, syllable, number, shape) that will permit the individual business or proprietor to communicate effectively the name and nature of the business or services offered. The maximum number of items of information shall be in keeping with the ability of the prospective viewer to see, assimilate and react to the message.

Section 134.011 - Special Purpose Signs (Requiring Permits)

A. Theater Signs. In addition to the signs otherwise permitted by these Sign Regulations, a theater shall be permitted a changeable message sign, the surface area of which shall not

exceed one-hundred twenty-eight (128) square feet. Any building in which is located two (2) or more theaters shall be permitted an extra sixteen (16) square feet of surface area per additional theater. Such signs shall require a sign permit.

B. Gasoline Price Displays. In addition to the signs otherwise permitted by these Sign Regulations, gasoline stations shall be permitted up to three (3) changeable message signs not to exceed nine (9) square feet each or one (1) changeable message sign not to exceed twenty-four (24) square feet for the purpose of displaying gasoline prices only. Notwithstanding any other provision contained in this Chapter, such signs may be affixed to the structure of a pole sign on the

property. Such signs shall require a sign permit.

C. Menu Signs for Drive-Through Restaurants. In addition to the signs otherwise permitted by these Sign Regulations, a drive-through restaurant shall be permitted one (1) menu sign placed in proximity to the drive-through lane for the purpose of ordering. Such sign shall be positioned at least forty (40) feet from any street right-of-way or residentially zoned property, shall have a surface area not exceeding twenty-four (24) square feet, and shall require a sign permit.

D. Time and Temperature Signs. One (1) time and temperature sign having a surface area not exceeding eighteen (18) square feet shall be permitted per non-residentially zoned property. Notwithstanding any other provision

contained in this Chapter, such signs may be affixed to the structure of a freestanding sign on the property. Such signs shall require a sign permit.

E. Signs to Announce Business Openings. Within any commercial or industrial district and within the Eastern Corridor subdistrict of the Urban Center District, one (1) sign may be placed per property to announce the opening of one (1) or more businesses located on the property. Such sign shall be placed for not longer than thirty (30) days, which period shall be specified on the requisite sign permit and shall begin within sixty (60) days of the actual date of occupancy. The surface area of the sign shall not exceed thirty-two (32) square feet. Such sign shall require a sign permit.

F. Signs to Announce Public, Charitable, Educational or Religious Events or Functions. Within any nonresidential district, one (1) sign may be placed per property to announce public, charitable, educational or religious events or functions. Such sign shall be placed for not longer than a single fourteen (14) day period in any one hundred eighty (180) day period. The surface area of the sign shall not exceed thirty-two (32) square feet. Such sign shall require a sign permit.

Section 134.012 - Sign Types

A. The following requirements shall apply to the individual types of signs permitted under this Chapter:

1. Pole Signs:

a. The sign and sign structure shall be positioned at least

five (5) feet from all property lines.

b. Neither the sign nor sign structure shall exceed six (6) feet in height when located in a residential zoning district or in the Limited Office District.

c. Neither the sign nor sign structure shall exceed twenty (20) feet in height when located in any district other than a residential zone or the Limited Office District, except that a sign which is permitted a surface area in excess of one hundred fifty (150) square feet shall be permitted a height of twenty-four (24) feet.

d. Any permanent pole sign having a height greater than six (6) feet or a surface area in excess of twenty-four (24) square feet shall be positioned not less than one hundred fifty (150) feet from any other such sign on the same property. Neither shall any such sign be positioned within one hundred fifty (150) feet of any ground sign on the same property having in excess of the aforementioned height or surface area.

e. In the event a pole sign is positioned less than eight (8) feet above grade and is strategically placed with respect to a vehicular accessway, the sign shall require the ap-

proval of the Traffic Engineer in order to ensure that sufficient cross-visibility is afforded.

f. Multiple detached signs shall be allowed on the same sign structure provided that, if framed together as a single sign (such framing to include air spaces that may exist between signs), the governing surface area contained herein is not exceeded. However, no sign or signs shall be placed on any sign structure which requires the combination or utilization in any manner whatsoever of two (2) or more surface areas identified in these Sign Regulations.

g. Permanent pole signs shall not be permitted within the Beach Commercial District and the Bayfront and Core subdistricts of the Urban Center District.

2. Wall Signs:

a. The sign shall be placed directly on or its structure shall be attached directly to the wall or face of a building.

b. Neither the sign nor its structure shall project more than one (1) foot from such building wall or face.

c. Neither the sign nor sign structure shall be located or project above the roof line of the building to which it is attached.

d. The sign and sign structure may project over a street right-of-way if provided with a clearance over grade of at least eight (8) feet and approved by the Traffic Engineer.

3. Projecting Signs:

a. The sign structure shall be attached to the wall or face of the building and shall project not more than four (4) feet from the building face or wall.

b. Neither the sign nor sign structure shall project above the roof line of the building to which it is attached.

c. Neither the sign nor sign structure shall be positioned

higher than twenty (20) feet over grade.

d. The sign and sign structure shall have a clearance over grade of at least eight (8) feet.

e. No projecting sign (including its structure) shall project over a street right-of-way unless specifically authorized by the Traffic Engineer.

f. Projecting signs shall not be permitted within the Beach Commercial District and the Bayfront and Core subdistricts of the Urban Center District.

4. Ground Signs.

a. The sign and sign structure shall be positioned at least five (5) feet from all property lines. This setback re-

quirement shall not, however, preclude placement of a sign on a privacy wall permitted in accordance with the applicable provisions of Chapter 136, Section 136.016 and this Development Code.

b. The sign and sign structure shall not exceed six (6) feet in height in any residential zoning district or in the Limited Office District, and shall not exceed eight (8) feet in height in any other district.

c. Any ground sign having a height greater than six (6) feet or a surface area in excess of twenty-four (24) square feet shall be positioned not less than one hun-

dred fifty (150) feet from any other such sign on the same property. Neither shall any sign be positioned within one hundred fifty (150) feet of any freestanding sign on the same property having in excess of the aforementioned height or surface area.

d. Any ground sign with a height in excess of three (3) feet which is strategically placed with respect to a vehicular accessway shall require the approval of the Traffic Engineer in order to ensure that sufficient cross-visibility is afforded.

5. Canopy, Awning or Marquee Signs:

a. The sign shall be affixed flush upon or suspended be-

neath the canopy, awning or marquee, and under no circumstance extend outward from or above the canopy, awning or marquee.

b. The sign shall have a clearance over grade of at least eight (8) feet.

c. The surface area for any one (1) sign may be equally divided and placed as two (2) signs on such canopy, awning or marquee.

6. Window Signs:

a. Temporary window signs shall not exceed fifty (50) percent of the area of the window in which they are displayed.

b. Permanent window signs shall not exceed fifteen (15) per-

cent of the area of the window in which they are displayed.

c. All window signs shall be placed only in the windows of nonresidential uses.

7. Portable Signs:

a. Not more than one (1) portable sign shall be placed on any property.

b. The sign and sign structure shall be positioned at least five (5) feet from all property lines.

c. The sign and sign structure shall not exceed six (6) feet in height in any residential zoning district or in the Limited Office District, and shall not exceed eight (8) feet in height in any other district.

d. Any portable sign with a height in excess of three (3) feet which is strategically placed with respect to a vehicular accessway shall require the approval of the Traffic Engineer in order to ensure that sufficient cross-visibility is afforded.

e. Portable signs shall be used only as temporary signs.

8. Double-faced Signs:

a. The two (2) sign faces shall not be more than a total of three (3) feet distant at any two (2) closest points.

b. The two (2) faces shall be either parallel or at not more than a thirty (30) degree angle to one another.

c. Each sign face shall be of identical surface area and configuration, but shall not be required to convey the identical message.

d. Double-faced signs shall, for the purpose of determining surface area, be computed only on one (1) of the two (2) sign faces.

9. Multiple-faced Signs:

a. Each sign face shall be of identical surface area and configuration, but shall not be required to convey the identical message.

b. Multiple-faced signs shall, for the purpose of determining surface area, be computed on the basis of the cumulative

surface area of all individual faces less and except one (1).

Article III. Administrative Provisions

Section 134.013 - Permits

A. Applicability. No sign shall be located, placed, erected, constructed, altered or extended without first obtaining a sign permit therefor, with the exception of the following actions which shall not require a permit:

1. Changing the advertising copy, announcement or message on a marquee or changeable copy sign board so designed to alter such copy.

2. Cleaning, painting, electrical or comparable general maintenance or repair of a sign that does not alter any regulated feature of such sign.

3. Locating a sign which is specifically exempt from the otherwise

applicable permitting requirements in accord with Section 134.008 of this Chapter.

B. Procedure. The following identifies the procedure to procure a sign permit:

1. All applications for sign permits shall be prepared on forms available at the office of the Development Code Administrator.
2. Applications for sign permits shall be submitted to the Development Code Administrator for review and processing. Such applications shall be accepted by the Code Administrator only upon determination that all requisite documentation and fees (as identified in following paragraph "C") accompany the application form.

3. The Development Code Administrator shall forward a copy of the completed application form and associated plans and specifications to the Building Director.
4. The application shall include such supplementary information as may be specifically requested by the Development Code Administrator or the Building Director to determine compliance with this Development Code and the Building Code.
5. The Development Code Administrator shall review the application and plans and specifications to determine whether the proposed sign conforms to all applicable requirements of this Development Code.
6. The Building Director shall review the application and plans and spe-

cifications to determine whether the proposed sign conforms to all applicable requirements of the Building Code.

7. Following review and determination as to conformance by both the Development Code Administrator and the Building Director, the Development Code Administrator shall in a reasonably expeditious manner either approve or deny the application for the sign permit.

C. Submission Requirements. No request for a sign permit shall be considered complete until all of the following has been submitted to the Development Code Administrator:

1. Application Form. A written application shall be made on forms available at the office of the Development Code Administrator.

The application form shall be submitted in duplicate to the Code Administrator and shall include the following:

a. Legal description of the property where the sign is proposed to be located.

b. Name, address and telephone number of the owner of the property where the sign is proposed to be located.

c. Name, address and telephone number of the lessor of the property or building upon which the sign is proposed to be located, if applicable.

d. Name, address and telephone number of the sign erector.

e. Type of sign proposed.

f. Surface area of the sign proposed.

g. Value of sign proposed.

h. Signature of the applicant.

2. Statement of Authorization. Any application form which is signed by an individual other than the property owner shall be accompanied by a notarized statement of authorization consenting to the sign placement or, if the property or building upon which the sign is to be located is leased, a copy of the executed lease shall accompany the application form. In the event the building or property is leased and the application form is signed by an individual other than the lessor, the application shall be accompanied by a notarized statement of authorization signed by the lessor consenting to the

sign placement and a copy of the executed lease.

3. Plans and Specifications. Plans and specifications for any proposed sign shall be submitted in duplicate, drawn to scale and include the following:

a. Dimensions and elevations (including the message) of the sign.

b. Lot frontage on all street rights-of-way.

c. Maximum and minimum height of the sign, as measured from finished grade.

d. Location of the sign in relation to property lines, public rights-of-way, easements, buildings, and other signs on the property.

e. Dimensions of the sign's supporting members.

f. For illuminated signs, the type, placement, intensity and hours of illumination.

g. Construction and electrical specifications, for the purpose of enabling determination that the sign meets all applicable structural and electrical requirements of the Building Code.

h. Number, type, location and surface area of all existing signs on the same property and/or building on which the sign is to be located.

4. Application Fee. The applicant shall be required to pay an application fee according to the current schedule of fees established

by the City Commission for the particular category of application. This fee shall be nonrefundable irrespective of the final disposition of the application.

D. Permit Expiration. Sign permits shall be valid for a maximum of one hundred eighty (180) days after issuance. Failure to place the sign within the allotted time period shall void the permit and necessitate reapplication.

E. Permit Identification. All signs requiring a permit shall have the permit number permanently marked on the sign in a visible location.

Section 134.014 - Inspections

A. The Development Code Administrator and the Building Director shall, as each may determine necessary, inspect the property to ascertain that the sign is in accord with all provisions of this

Development Code and the Building Code, respectively, and in accord with all terms upon which the sign permit may have been conditioned.

Section 134.015 - Nonconforming Signs

A. No nonconforming sign may be constructed, reconstructed, altered, renovated, relocated, replaced or otherwise changed after the effective date of this Chapter, unless such action brings the sign into conformance with the provisions of this Chapter.

B. Any existing sign that is destroyed or damaged to the extent of more than fifty (50) percent of its replacement cost after the effective date of this Chapter shall not be rebuilt, repaired or replaced except in conformity with the provisions of this Chapter.

C. All signs and sign structures which are nonconforming to the requirements

of this Chapter either by variance previously granted or by conformance to the previously existing sign regulations at the time the permit was issued, shall within seven (7) years from the effective date of this Development Code be removed by the owner of the sign or the owner of the property or be brought into compliance with the terms contained herein, except for the following:

1. Any nonconforming sign located on an interstate or federal aid primary highway (i.e., U.S. Highway 19 and State Road 580 east of U.S. Highway 19) which is protected from removal by the Federal Highway Beautification Act or Chapter 479, Florida Statutes, by reason of providing compensation for removal shall be exempted from the

removal terms of this paragraph. This shall not, however, preclude the City from seeking to remove any such sign through an eminent domain proceeding, nor achieving sign conformance by other lawful means. In the event the Federal Highway Beautification Act or Chapter 479, Florida Statutes, is repealed, amended or adjudicated to not require compensation, then the provisions contained in this paragraph shall prevail.

2. Any nonconforming sign located on Gulf-to-Bay Boulevard east of Highland Avenue which, if said Boulevard was classified a federal aid primary highway, would be protected from removal by the Federal Highway Beautification Act or Chapter 479, Florida Statutes, by

reason of providing compensation for removal.

D. It shall be the responsibility of the Development Code Administrator to undertake an inventory for the purpose of identifying and recording all nonconforming signs. Following identification and recordation, the Code Administrator shall notify the property owner or sign owner/lessor identifying the action(s) necessary to make the sign(s) conform to these Sign Regulations, the date that such sign(s) shall be removed if not altered to conform, the opportunity to seek relief through a variance proceeding and the penalties for noncompliance. Said notice shall be given at least eighteen (18) months prior to the removal date specified in paragraph "C" of this Section; under no circum-

stance, however, shall failure to give or receive notice constitute grounds for noncompliance or untimely compliance.

E. Legal nonconforming signs which exist on property annexed into the City within the seven (7) year period following adoption of this Development Code shall be subject to the removal or compliance provisions contained in paragraph "C" of this Section. Following seven (7) years from the date of adoption of this Development Code, sign compliance shall occur in a time and manner prescribed by the City Commission in conjunction with consideration of the annexation application.

F. Any person aggrieved by the removal or alteration provisions set forth in paragraph "C" or "E" of this Section

may apply to the Development Code Adjustment Board for a variance in accordance with the terms set forth in Chapter 137, Section 137.012. Any request for a variance from terms of said paragraph "C" shall be filed with the Development Code Administrator at least ninety (90) days but not more than eighteen (18) months prior to the aforementioned removal date. In addition to the standards which govern approval of variances contained in said Section 137.012, the Board shall consider the propriety of the application of this Section based upon the following factors:

1. Type and extent of the nonconformity (e.g., use, size, height, number, setback, etc.).
2. Location of the nonconforming sign.

3. Potential adverse cosmetic effects on the property or building, if any.
4. Nature of the surrounding uses, both on-site and off-site.
5. Location of the nearest similar sign, if any.
6. Leasing arrangements, if any.
7. Date of installation or erection.
8. Initial capital investment.
9. Life expectancy of the investment.
10. Investment realization to date.
11. Cost to alter or remove the sign.
12. Salvage value.
13. Part of the owner's or lessor's total business involved.
14. Monopoly or advantage due to prohibition on similar new signs in the vicinity.
15. Other factors which may be unique to the property or sign.

The Development Code Adjustment Board may grant a variance only after a public hearing and a demonstration by the owner/lessor of hardship different in kind and magnitude from that suffered by other sign owners or lessors similarly situated. Any decision of the Development Code Adjustment Board may be appealed to the Hearing Officer in accordance with the terms set forth in Chapter 137, Section 137.013.

Section 134.016 - Abandoned Signs

A. Except as otherwise provided in this Chapter, any sign that is located on property which becomes vacant and unoccupied, pertains to a business which does not maintain a current and valid City occupational license, or pertains to a time, event, or purpose which no longer applies, shall be deemed to have been abandoned. Any abandoned

sign shall be prohibited in all zoning districts and shall be removed by the owner of the sign or owner of the property. The frame of an abandoned sign shall not be required to be removed if it conforms to all applicable terms contained in these Sign Regulations (including the surface area for sign replacement yielded by such frame).

B. Any sign structure which supported an abandoned sign and which structure conforms to all applicable terms contained in these Sign Regulations shall be allowed to remain in place. However, in the event a sign structure which supported or supports an abandoned sign is inconsistent with any term contained in these Sign Regulations (including the surface area for sign replacement yielded by the frame), then the sign structure and

frame shall immediately be either altered to comply with the terms contained herein or removed by the owner of such structure or property.

Section 134.017 - Illegal Signs

A. The following signs shall be considered to be illegal:

1. A sign placed after the effective date of this Development Code which is inconsistent with the terms contained herein.
2. A sign placed prior to the effective date of this Development Code which required the issuance of a permit according to the regulations applicable at the time, but which permit was never procured.
3. A sign placed prior to the effective date of this Development Code which did not require the issuance of a permit according to the regu-

lations applicable at the time, but which sign was placed inconsistent with the terms governing location, height, surface area or other regulatory measure applicable at the time.

4. A sign damaged or destroyed in excess of fifty (50) percent of its replacement cost and which is not removed consistent with the terms of these Sign Regulations.

5. A sign which is abandoned.

B. Upon determination by the Development Code Administrator that a certain sign is illegal, the Code Administrator shall act to remedy the violation, which may include:

1. The issuance of a citation of violation to the individual who owns, is responsible for, or benefits

from the display of such sign prescribing:

a. The action necessary to make the sign legal and conforming to the terms contained in this Development Code.

b. The time which the individual is afforded to accomplish such action.

2. The issuance of a citation of violation to the individual who owns, is responsible for, or benefits from the display of such sign ordering:

a. The removal of the illegal sign.

b. The time which the individual is afforded to accomplish such removal.

3. The removal of any illegal sign located on public property, inclu-

ding any such sign located within a street right-of-way.

Section 134.018 - Interpretation and Variance

A. The administration, interpretation and application of the provisions of this Chapter not otherwise specifically set out herein shall be as set forth in Chapter 131, Preamble, and Chapter 137, Administration and Enforcement, of this Development Code.

B. Any sign which may be classified within more than one sign category shall be classified within the most restrictive category.

C. In the event signs are authorized to be placed by these Sign Regulations on the basis of property being afforded multiple street frontages, then each such sign shall be positioned to be

primarily viewed from each such frontage.

D. Any request for variance from the standards set forth in this Chapter shall be according to the process and criteria for variances to this Land Development Code as set forth in Chapter 137, Section 137.012. No variance shall be granted that would altogether obviate the distinction between sign types and size by zoning district or such like areas of legislative prerogative which shall not under any circumstances be varied.

Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1176

In The

Supreme Court of the United States

October Term, 1987

DON'S PORTA SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES L. SIEMON
(Counsel of Record)
WILLIAM W. MERRILL III
SIEMON, LARSEN, MATTLIN & PURDY
1800 Second Street, Suite 903
Sarasota, Florida 34236
(813) 955-9050

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether the court of appeals erred in applying the standard of review established in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), when it reversed the district court's invalidation of a commercial speech regulation prohibiting portable signs.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	20

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 7

Bartimo v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986) ..... *passim*

Baumgartner v. United States, 322 U.S. 665 (1944) 6

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) ..... *passim*

Beyer v. Le Fevre, 186 U.S. 114 (1902) 6

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) ..... *passim*

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 11

Clarke v. Committee for Creative Non-Violence, 468 U.S. 288 (1984) 12

Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987) 3, 5, 14

Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984) ..... *passim*

Dunagin v. City of Oxford, 489 F.Supp. 763 (N.D. Miss. 1980) 18

Fiske v. Kansas, 274 U.S. 380 (1927) 7

Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1987) 5

Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n, 539 F.Supp. 877 (S.D. Miss. 1982) 18

TABLE OF AUTHORITIES—Continued

	Page
Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987) *cert. denied*, — U.S. — (Case No. 87-799. Jan. 11, 1988)	*passim*
Mandel v. Bradley, 432 U.S. 173 (1977)	15
Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)	5, 12
Metromedia, Inc. v. City of San Diego, 453 U.S. 557 (1980)	5, 10, 12, 19
Planned Parenthood Association/Chicago Area v. Chicago Transit Authority, 767 F.2d 1225 (7th Cir. 1985)	16, 18
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	7
Rankin v. McPherson, — U.S. —, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), *reh. denied*, — U.S. — (1987)	7, 11
Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528 (11th Cir. 1985)	12
Tavoulareas v. Piro, 759 F.2d 90, *vacated in part by*, 763 F.2d 1472 (D.C. Cir. 1985)	4, 7
Constitutional Provisions	
First Amendment, U.S. Constitution	*passim*
Fourteenth Amendment, U.S. Constitution	10
Rules	
Federal Rule of Civil Procedure 52(a)	*passim*

No. 87-1176

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

DON'S PORTA SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

Respondent, City of Clearwater, respectfully prays that the Court deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

—o—

STATEMENT OF THE CASE

Petitioners statement of the case contains several critical misstatements of the record. Petitioners note that portable signs are used for commercial and non-commercial messages. But Petitioners fail to state that the City of Clearwater's sign regulations "contain exemptions for political and other non-commercial speech." (Appendix 50-a).

The record also shows that the Eleventh Circuit reversed the district court's invalidation of the sign regulations based upon an "independent examination of the whole record," (Appendix 56-a), not a *de novo* review, as is misrepresented by Petitioners.

Finally, Petitioners state that the Eleventh Circuit found that the district court had applied the proper legal test. They fail to point out that the Eleventh Circuit also found that the district had predicated its findings on a misunderstanding of the governing rules of law under that test. (Appendix 54-a through 58-a).

o

SUMMARY OF ARGUMENT

The law is clear in this case: reviewing courts, are obligated to independently review 1) mixed findings of law and fact, and 2) "ultimate constitutional facts"—including "judgments lying close to opinion regarding the whole nature of our Government" in cases involving First Amendment rights. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 485, 500 (1984); *Bartimo*

v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894 (5th Cir. 1983), *cert. denied*, 475 U.S. 1119 (1986).

o

REASONS FOR DENYING THE WRIT

Petitioners contend that the Eleventh Circuit erred by going beyond the "clearly erroneous" standard of review because, according to Petitioners, the *Bose* rule of independent review[1] does not apply in an appeal from a district court determination that a local regulation does not "directly advance" the government's aesthetic interest and is "more extensive than necessary" to accomplish that goal. This argument has been repeatedly rejected by this Court and the courts of appeals.

It is well-settled under *Bose* and its progeny that the "findings" reviewed by the Eleventh Circuit involve "constitutional facts," "special facts that have been deemed to have constitutional significance," or "judgments lying close to opinion regarding the whole nature of our Govern-

---

[1]The Eleventh Circuit in the decision below expressed that it must make "an independent examination" of the record "to determine whether a commercial speech regulation [prohibiting portable signs] directly advances the government's [aesthetic] goals or is more extensive than necessary," *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053-1054, n. 9 (11th Cir. 1987). Petitioners nonetheless incorrectly state and argue that the Eleventh Circuit "applied a *de novo* review of the District Court's findings," Pet. at 4, *passim*. This Court explained in *Bose* that:

> The independent review function is not equivalent to a "*de novo*" review of the ultimate judgment itself, in which a reviewing Court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for Plaintiff.

ment." *Bose*, 466 U.S. at 505. *See Dunagin v. City of Oxford*, 718 F.2d 738, 748-749, n. 8 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1108, n. 9 (5th Cir. 1987), *cert. denied*, U.S. (Case No. 87-799. Jan. 11, 1988); *Tavoulareas v. Piro*, 759 F.2d 90, 108 (D.C. Cir. 1985), *vacated in part by*, 763 F.2d 1472 (D.C. Cir. 1985).

—o—

THE ELEVENTH CIRCUIT DID NOT ERR IN INDEPENDENTLY REVIEWING MIXED QUESTIONS OF LAW AND FACT

The law is clear: reviewing courts, such as the Eleventh Circuit, are obligated to independently review mixed findings of law and fact. This Court put it well in *Bose*:

> But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a *so-called mixed finding of law and fact, or a finding of fact that is predicated on the misunderstanding of the governing rule of law.*

Bose, 466 U.S. at 501. (emphasis added).

In the case *sub judice*, the Eleventh Circuit recognized that the district court applied the proper four-part commercial speech test dictated by *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557 (1980). But, the circuit court found that the district court made findings under the third and forth prongs of the *Central Hudson* test predicated on a misunderstanding of the governing rules of law—rules of law that inherently involve

mixed questions of fact and law. *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053-54 (11th Cir. 1987). *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 557 (1980); *Members of the City Council v. Taxpayers of Vincent*, 466 U.S. 789 (1984); *Harnish v. Manatee County*, 783 F.2d 1535 (11th Cir. 1987); *Lindsay*, 821 F.2d 1103; *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528 (11th Cir. 1985). The Eleventh Circuit did not err in applying independent review to the mixed questions of fact and law findings germane to the third and fourth prongs of the *Central Hudson* test. In fact, the court of appeals was obligated to make such a review.

—o—

THE ELEVENTH CIRCUIT DID NOT ERR IN INDEPENDENTLY REVIEWING QUESTIONS OF "CONSTITUTIONAL FACT"

The *Bose* Court emphasized that the requirement of independent review of First Amendment constitutional issues is a rule of federal constitutional law.

> It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection *is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold* that bars the entry of any judgement that is not supported by clear and convincing proof of "actual malice."

Bose, 466 U.S. at 510-11 (emphasis added).

Most important, this Court, after delineating the appropriate standard of review, identified the types of "findings" that are subject to independent review:

> In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the *judicial evaluation of special facts that have been deemed to have constitutional significance.* In such cases, the Court has regularly conducted an independent review of the record book to be sure that the speech in question actually falls within the unprotected category and *to define the perimeters of any unprotected category with acceptably narrow limits* in an effort to ensure that protected expression will not be inhibited.

Bose, 466 U.S. at 504-505 (emphasis added). This Court emphasized that:

> "The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. . . . Though labeled 'finding of fact,' it may involve the very basis on which judgement of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court. See, e.g., *Beyer v. Le Fevre*, 186 U.S. 114, 22 S.Ct. 765, 46 L. Ed. 1080 (1902). *Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.*" *Baumgartner v. United States*, 322 U.S. 665, 670-671, 64 S. Ct. 1240, 1243-1244, 88 L. Ed. 1525 (1944).

Bose, 466 U.S. at 500 (emphasis added). *See Dunagin v. City of Oxford*, 718 F.2d 738, 748-49, n. 8 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984) ("legislative facts" or "questions of constitutional magnitude"); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1108, n. 9 (5th Cir. 1987), *cert. denied*, —U.S.— (Case No. 87-799. Jan. 11, 1988) ("constitutional 'status'"); *Tavoulareas v. Piro*, 759 F.2d 90, 108 (D.C. Cir. 1985), *vacated in part by*, 763 F.2d 1472 (D.C. Cir. 1985) ("ultimate constitutional fact").[2] *See, generally, Pullman-Standard v. Swint*, 456 U.S. 273, 286-87, n. 16 (1982).

This Court, "in marking out the limits of the standard," *Bose*, 466 U.S. at 503, put forth the rule that certain findings cross the threshold of "pure fact" and become constitutionally significant because they are "close to opinion regarding the whole nature of our Govern-

---

[2]Examples of such facts which are subject to independent review under the well-settled precedent of this Court and the courts of appeal include whether a writing was "obscene," whether there was a "clear and present danger," whether there was "actual malice," or other factual conclusions about the speaker's intent, audience effect, and other elements of context that are not easily disentangled from a decision as to whether a statement was "political" or directed at "public concerns." *Lindsay*, 821 F. 2d at 1108, n. 9; *See Bose*, 466 U.S. at 505-506; *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *Rankin v. McPherson*, — U.S. —, 107 S. Ct. 2891 (1987); *Bartimo*, 771 F.2d 894; *Dunagin*, 718 F.2d at 748-49, n. 8.

Findings which may *not* be subject to independent review have been identified as "preliminary factual determinations," (*Tavoulareas*, 759 F. 2d at 108), "what was said" (*Lindsay*, 821 F 2d at 1108), "logic and common experience which are ordinarily entrusted to the finder of fact" (*Bose*, 466 U.S. at 501, n. 17) or any other facts which are not so intermingled with a conclusion of law as to a federal right to require analysis by independent review (*Fiske v. Kansas*, 274 U.S. 380, 385-87 (1927)).

ment," that is, "ultimate constitutional fact." *Bose*, 466 U.S. at 500, n. 16.[3] In such cases, this Court emphasized that reviewing courts must not only provide protection to parties asserting First Amendment rights, but also define the perimeters of those rights to ensure that they are not abused. *Id. See Bartimo*, 771 F.2d at 897.

The courts of appeal have followed this Court's lead and have recognized the importance of independently reviewing "ultimate constitutional facts". In *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), the court of appeals ruled that the trial court's findings are "clearly not" subject only to a clearly erroneous standard of review (*Dunagin*, 718 F.2d at 748, n. 8):

> There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction and illegal in another?

[3]Petitioners themselves state "[e]ven where the underlying judgment is against the party asserting First Amendment rights, independent review extends only to ultimate conclusions." Pet. at 11-12. However, they fail to understand the types of "findings" which comprise "ultimate conclusions," or better, "ultimate constitutional facts." *See Bose*, 466 U.S. at 505-506. *See* n. 1, *supra*, at 3. Whether a commercial speech regulation "directly advances" a government's interest and whether it is "no more extensive than necessary" to accomplish its goals is the type of "ultimate constitutional fact" that is within the purview of independent review. *Id.*

Dunagin, 718 F.2d at 749. Most instructive, the *Dunagin* court reasoned:

> In the first place, the issue of whether there is a correlation between advertising and consumption is a *legislative and not an adjudicative fact question.* It is not a question specifically related to this one case or controversy; it is a question of social factors and happenings which may submit to some partial empirical solution but is likely to *remain subject to opinion and reasoning.* See Fed.R.Evid. 201 advisory committee note. That reasoning is the responsibility of legislators and judges, assisted by scholars as well as social scientists. The specific issue here was undoubtedly considered by the Mississippi Legislature when local option and the curtailment of liquor consumption were being studied. Now the issue has moved to the judicial stage. *If the legislative decision is not binding at this stage, at least it carries great weight. Certainly it cannot be thrust aside by two experts and a judicial trier of fact.* The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court. (cites omitted) *Furthermore, the decision on whether a regulation of commercial speech directly advances the state's interest, for example, is an exercise of constitutional adjudication wherein appellate courts play a special role. Applying the legal tests that have evolved in constitutional law invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests.* The Supreme Court has often warned that each First Amendment case must be analyzed separately, based on the particular method of communication involved, and the values and dangers implicated. "The protection available for particular commercial expression turns on the nature both of the expression and of the government interests served by its regulation." *Central Hudson Gas, supra*, 447 U.S. at 563,

> 100 S.Ct. at 2350. The questions raised in such cases involve mixed questions of law and fact. In this case, for instance, the extent to which *Metromedia*, . . . and other cases temper the *Central Hudson Gas* test is a legal question.

Dunagin, 718 F.2d at 748 (emphasis added). *See Central Hudson*, 447 U.S. 557, 563 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981).

Most notably, this Court denied certiorari review in the most recent case which presented to this Court the same question presented by Petitioners for review in the instant case. *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, —U.S.— (Case No. 87-799. Jan. 11, 1988), is a case astonishingly similar to the facts and law presented in the instant case. In that case, businesses engaged in supplying, leasing, renting and selling portable signs brought an action challenging, under First and Fourteenth Amendments, the constitutionality of the city's commercial speech regulation prohibiting portable signs. The district court granted the portable sign businesses' motion for preliminary injunction against enforcement of the regulation, and the City appealed. The court of appeals held that the city's portable sign ban directly advanced the city's aesthetic interests and that it was not substantially broader than necessary to protect that interest.

In arriving at its holding, the appellate court relied on the *Bose* rule and independently reviewed the district court's findings germane to First Amendment issues of a constitutional magnitude.

> Thus, the critical inquiries are, as the District Court stated, whether the ordinance does further the City's interests and whether the restriction on speech is greater than is essential to the furtherance of those interests.

Lindsay, 821 F.2d at 1109. The court of appeals recognized that the "critical inquiries" were, in essence, constitutional questions involving separation of powers between the legislative and judicial branches of government.

> The limits on such a determination seem boundless. In a related vein, when a trial court makes such a finding, the potential for the court to substitute its own judgment about aesthetics for that of the body charged with making aesthetic determinations is great. Left open is the possibility that the trial court will decide that nothing short of full achievement—as opposed to "furtherance"—of a governmental purpose is sufficient to justify a particular restriction on speech. Indeed, in the instant case, notwithstanding, protestations by the court to the contrary, the court's general description of the problem with the ordinance —"its failure to accomplish its aesthetic purpose" —suggests that the district court took such an approach to the question raised under *Vincent* of whether the regulation "furthers an important or substantial governmental interest." *Vincent*, 466 U.S. at 805 (cites omitted). It seems that the district court may have been holding the City to a standard requiring it to cure all visual blight, or none at all.

Lindsay, 821 F.2d at 1109. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 931 (1986).

Under the reasoning employed in *Bose*, *Rankin v. McPherson*, — U.S. —, 107 S.Ct. 2891, 2896 (1987), *reh. denied*, —U.S.— (1987), and *Dunagin*, 718 F.2d at 748-49, n. 8, the court of appeals found that the findings under the third and fourth prongs of the *Central Hudson* test are

ones for which independent review is appropriate. Thus, "the decision on whether a regulation of commercial speech directly advances the state's interest is an exercise of constitutional adjudication wherein appellate courts play a special role." *Dunagin*, 718 F.2d at 748, n. 8. The court of appeals was required to apply the legal tests that evolved in constitutional law, including *Metromedia*, 453 U.S. 490 (1981) (plurality); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Clarke v. Committee for Creative Non-Violence*, 468 U.S. 288 (1984); *Harnish v. Manatee County*, 783 F.2d 1535 (11th Cir. 1986); *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528 (11th Cir. 1985); and *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), in order to interpret the third and fourth prongs of the *Central Hudson* test as it applies to the facts in the case. Such application invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests. *Dunagin*, 718 F.2d at 748.

These cases, contrary to Petitioners' argument, are instructive and control the decision in the instant case. Without repeating all of the findings in the case *sub judice*, it is appropriate to say that it is on point with the facts in *Lindsay*, and that the findings were quite similar. The Eleventh Cicruit, in accordance with these established principles, independently reviewed the First Amendment issues of constitutional magnitude. The proper application of the controlling constitutional law on the substantive issues required the court of appeals to independently review these "judgments lying close to opinion regarding the whole nature of our Government," which this Court calls "ultimate constitutional facts."

PETITIONERS' ARGUMENT IS FALLACIOUS RESULTING FROM CONVERSION OF AFFIRMATIVE PROPOSITIONS IN BOSE AND ITS PROGENY

Respondent submits that Petitioners' glib argument is, in fact, a house of cards constructed of non sequiturs[4] and out-of-context quotes.

Whether or not a party asserting First Amendment rights won or lost at the trial court level is not determinative of whether or not fundamental constitutional principles are involved and whether the reviewing appellate court is empowered to conduct an independent review. *See Bose*, 466 U.S. 485 (1984); *Lindsay*, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, — U.S. — (Case No. 87-799. Jan. 11, 1988); *Dunagin*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Bartimo*, 711 F.2d 894 (5th Cir. 1983), *cert. denied*, 475 U.S. 1119 (1986); *Tavoulareas v. Washington Post Co.*, 759 F.2d 90 (D.C. Cir. 1985), *vacated in part by*, 763 F.2d 1472 (D.C. Cir. 1985).[5]

---

[4]Although never stated or implied by the Court in *Bose* or any of its other cases, Petitioners suggest that the decision by district courts (whether against or in favor of the party asserting First Amendment rights) will always determine the standard of review to be applied by reviewing courts in First Amendment cases. Such a position is ridiculous. *See Bose*, 466 U.S. at 510, n. 29; *Bartimo*, 771 F. 2d at 898, n. 3.

[5]Respondent submits that it is significant that Petitioners fail to contest, or even address, the substantive issues presented below in the district court and court of appeals. The merits below, which are not under consideration by the Court in this case, concerned the third and fourth prongs of the four-part commercial speech test established in *Central Hudson*, 447 U.S.

(Continued on following page)

It is evident from reading the entire opinion of the Court in *Bose*[6] that the rationale of *Bose* applies here. Petitioners simply ignore the Court's broad language in *Bose*, which makes no distinction whatever between cases where judgment was in favor of the alleged defamer and those where judgment was in favor of the alleged defendant. The Fifth Circuit in *Bartimo* observed that if the Court had intended to make such a distinction, it would have so limited its holding in *Bose*. *Id.*[7]

> [D]*efinition of First Amendment protection requires inclusion as well as exclusion and the former is no less a judicial function merely because it does not pose a direct threat to First Amendment values. Including speech within the protected category requires no less careful an evaluation of constitutionally significant facts than excluding such speech.*

Bartimo, 771 F.2d at 897, *cert. denied*, 475 U.S. 1119 (1986). (emphasis added).

Indeed, this Court did not limit its holding in *Bose* and, in fact, indicated just the opposite proposition as to Petitioners' argument. The Court underscored the signifi-

---

(Continued from previous page)

557 (1980). Specifically at issue was whether a commercial speech regulation prohibiting portable signs directly advanced the government's aesthetic goals or was more extensive than necessary to accomplish those goals. *Don's Porta Signs, Inc.*, 829 F. 2d 1051, 1053-54, n. 9.

[6]Petitioners, by sleight of hand, attempt to string together bits and pieces of the *Bose* opinion in an attempt to camouflage the weakness of their petition as well as to invent grounds on which to base their petition.

[7]See n. 9, *infra*, at 15.

cance of the independent review standard and identified one of the rationales behind the rule:

> A similar concern with the need to "preserve the right of free speech *both* from suppression by tyrannous, well-meaning majorities *and from abuse by irresponsible, fanatical minorities,*" (cite omitted) was identified by Justice Brandeis . . .

Bose, 466 U.S. at 510, n. 29 (emphasis added). The rule of independent review, as the Court has concluded, is exercised not only to *protect* the party asserting First Amendment rights, but also to prevent *abuse* by that party.

Most instructive is the Fifth Circuit's well-reasoned decision in *Bartimo v. Horsemen's Benevolent and Protective Ass'n*, 771 F.2d 894 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986).[8] In *Bartimo*, the trial court found that

---

[8]The Fifth Circuit has noted that:

> The Supreme Court has declared that while summary dispositions of appeals are decisions on the merits that bind lower federal courts, such decisions extend only to "the precise issues presented and necessarily decided by those actions. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Respondent suggests that this Court's denial of certiorari review in *Dunagin*, *Lindsay*, and *Bartimo* provides binding precedent for federal courts of appeal and district courts to follow. Each of these cases presented the same question presented for review in the instant case to this Court. For example, in *Lindsay* this Court was presented with the following "question presented for review:"

> Whether the rule announced in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) requiring that courts of appeal examine the whole record of a proceeding to assure that First Amendment rights are not intruded upon was properly applied to overturn a district court's preliminary injunction protecting Petitioner's rights to free expression.

no actual malice existed and dismissed plaintiff's defamation claim. In so doing, of course, the trial court ruled *in favor* of the party asserting First Amendment rights. In reviewing the trial court's finding in favor of the party asserting First Amendment rights, the Fifth Circuit exercised the rule of independent review which was stated by this Court "in terms broad, clear and without exception." *Bartimo,* 771 F.2d at 897. The defendant's claimed that the *Bose* rule did not apply because "the district court's finding of no actual malice and its dismissal of the plaintiff's defamation claim present no threat to the First Amendment values," *Bartimo,* 771 F.2d at 897, but the Fifth Circuit flatly rejected that argument.

> First, it is not clear to us that the rationale of *Bose,* is inapplicable here, for *definition of First Amendment protection requires inclusion as well as exclusion and the former is no less a judicial function merely because it does not pose a direct threat to First Amendment values. Including speech within the protected category requires no less careful an evaluation of constitutionally significant facts than excluding such speech.*

Bartimo, 771 F.2d at 897 (emphasis added).

Petitioners rely upon a Seventh Circuit Court of Appeals decision in *Planned Parenthood Association/Chicago Area v. Chicago Transit Authority,* 767 F.2d 1225 (7th Cir. 1985). Petitioners argue that the Seventh Circuit opinion in *Planned Parenthood* stands for the proposition that where the trial court rules in favor of the party asserting First Amendment rights, the standard of review established in *Bose* should not apply.[9] *Planned Parenthood* recognized that *Bose* required independent review of "certain facts that have been deemed to have *constitutional significance.*" *Planned Parenthood,* 767 F.2d at 1229 (emphasis added). The Seventh Circuit emphasized that the rule reflects a special solicitude for claims that the protection afforded by the First Amendment have been unduly abridged.

In determining whether the *Bose* rule should apply to the factual questions on appeal in that case, the Seventh Circuit recognized that only three of the District Court's factual findings were being challenged: "(1) That CTA has previously accepted 'controversial public-issue advertising,' (2) that CTA has no policy against accepting such advertising, and (3) that CTA's expressed reasons for rejecting abortion-related advertising are unfounded and speculative." *Planned Parenthood,* 767 F.2d at 1228. None of the fact questions were mixed questions of fact and law, or "constitutional facts." Indeed, each of these "factual findings" of the district court which were challenged on appeal was the type of finding that truly involves "pure fact." None of the fact questions presented to the Seventh Circuit in that case involved "judgments lying close to opinion regarding the whole nature of our Government" and did not constitute an "ultimate constitutional fact."

---

[9]Petitioners' argument to apply the independent review standard only if the trial court ruled against the party asserting First Amendment rights would introduce the possibility of a particular record being reviewed by two different standards as it made its way through the appellate process. *Bartimo,* 771 F. 2d at 898, n. 3. "We think judicial economy is best served by requiring the same standard of review at all levels, regardless of the outcome below." *Id.*

See Bose, 466 U.S. at 500, n. 16. Petitioner's reliance on *Planned Parenthood* through the artifice of out-of-context quotation should be ignored.

In *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), the Fifth Circuit once again exercised independent review in a case where the party asserting First Amendment rights prevailed at the trial level. And once again, the same question was presented for review as the one presented by Petitioners in this case.[10] In that case, and its connected case, the court of appeals independently reviewed two trial court decisions that split[11] on the issue of whether Mississippi's intrastate liquor advertising ban unconstitutionally abridged plaintiffs' commercial speech rights. In *Dunagin*, the district court found *against* the party asserting First Amendment rights. In the companion case, the district court found *in favor* of the party asserting First Amendment rights. Finding itself in the unique position of having both sides of the argument before it on the same First Amendment questions of constitutional magnitude, the Fifth Circuit stated that the trial courts' findings are "clearly not" subject only to a clearly erroneous standard of review (*Dunagin*, 718 F.2d at 748, n.8):

---

[10]See n. 8, *supra*, at 15.

[11]Two suits were filed attacking, principally on First Amendment grounds, a Mississippi commercial speech regulation prohibiting intrastate liquor advertising. The U.S. District Court for the Northern District of Mississippi *upheld* the regulation (*against* the party asserting First Amendment rights) in *Dunagin v. City of Oxford*, 489 F. Supp. 763 (N.D. Miss. 1980); the Southern District *invalidated* the regulation (*in favor* of the party asserting First Amendment rights) in *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 539 F. Supp. 817 (S.D. Miss. 1982).

> ***Furthermore, the decision on whether a regulation of commercial speech directly advances the state's interest, for example, is an exercise of constitutional adjucation wherein appellate courts play a special role. Applying the legal tests that have evolved in constitutional law invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests.*** The Supreme Court has often warned that each First Amendment case must be analyzed separately, based on the particular method of communication involved, and the values and dangers implicated. "The protection available for particular commercial expression turns on the nature both of the expresison and of the government interests served by its regulation." *Central Hudson Gas, supra*, 447 U.S. at 563, 100 S.Ct. at 2350. The questions raised in such cases involve mixed questions of law and fact. In this case, for instance, the extent to which *Metromedia*, . . . and other cases temper the *Central Hudson Gas* test is a legal question.

Dunagin, 718 F.2d at 748 (emphasis added). *See Central Hudson* 447 U.S. 557, 563 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981).

———o———

CONCLUSION

For the foregoing reasons, the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

CHARLES L. SIEMON
(Counsel of Record)
WILLIAM W. MERRILL III
SIEMON, LARSEN, MATTLIN & PURDY
1800 Second Street, Suite 903
Sarasota, Florida 34236
(813) 955-9050

Counsel for Respondent

Supreme Court, U.S.
FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1176

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON'S PORTA-SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

PETER J. WINDERS
(Counsel of Record)
DONALD E. HEMKE
CARLTON, FIELDS, WARD, EMMANUEL, SMITH, CUTLER & KENT, P.A.
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

New Ninth Circuit Case 2

City's Misreading of Bose Corporation 3

City's Arguments on the Factual Merits of the Ordinance 4

City's Assertion That Denial of Certiorari Is Binding Precedent 5

Conclusion 7

TABLE OF CITATIONS

Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119, 106 S.Ct. 1635, 90 L.Ed. 2d 181 (1986) 3, 4, 5

Bose Corporation v. Consumers Union of the United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1984) 1,2, 3, 4, 7

Daniels v. Allen, 344 U.S. 443, 497, 73 S.Ct. 397, 97 L.Ed. 469 (1953) 6

Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984) 3, 5

Hopfmann v. Connolly, 471 U.S. 459, 105 S.Ct. 2106, 85 L.Ed. 2d 469 (1985) 6

House v. Mayo, 324 U.S. 42, 48, 65 S.Ct. 517, 521, 89 L.Ed. 739 (1945) 6

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 366 n.1, 93 S.Ct. 647, 650 n.1, 34 L.Ed. 2d 577 (1973) 6

Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, ... U.S. ....., 108 S.Ct. 707, 98 L.Ed. 2d 658 (1988) 3, 4, 5

Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed. 2d 199 (1977) 5
Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919, 70 S.Ct. 252, 255, 94 L.Ed. 562 (1950) (Frankfurter, J.) 6
Sunal v. Large, 332 U.S. 174, 181, 67 S.Ct. 1588, 1592, 92 L.Ed. 368 (1947) 6
The Daily Herald Co. v. Munro, 1988 U.S. App. Lexis 1204 (Case No. 86-3641, 9th Cir., opinion filed February 2, 1988) 2, 3

No. 87-1176

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON'S PORTA-SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,
Petitioners,

vs.

CITY OF CLEARWATER,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The sole issue presented on this petition is whether the Courts of Appeal are to review de novo (rather than under a "clearly erroneous" standard of review) a determination *in favor* of a party asserting First Amendment rights as they do certain determinations *against* an asserted First Amendment right. Two circuits have decided the question one way and two have decided the other way, all purporting to follow this Court's decision in *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1984).

New Ninth Circuit Case

Since this petition was filed, the Ninth Circuit has expressly adopted the position argued by petitioners. *The Daily Herald Co. v. Munro,* 1988 U.S. App. Lexis 1204 (Case No. 86-3641, 9th Cir., opinion filed February 2, 1988). The district court there, ruling in favor of the party claiming First Amendment rights, held that the statute was not the least restrictive means of advancing the state's interest. The Ninth Circuit affirmed, explicitly noting that

> The Constitution requires *different standards* for reviewing findings of fact in those cases in which the district court *upholds a restriction* on speech as constitutional *than in those in which it does not.* When a district court *holds a restriction* on speech *constitutional, we conduct an independent, de novo examination* of the facts. When the *government* challenges the district court's holding that the government has unconstitutionally restricted speech, on the other hand, we review the district court findings of fact for *clear error.* This rule "reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged," while not affording special protection "for the government's claim that it has been wrongly prevented from restricting speech." In this case, therefore, we review the district court's findings of fact for clear error (Emphasis added).

The Ninth Circuit's position is precisely petitioners' position on their writ for certiorari. What is crystally clear now is that four United States Courts of Appeals have split in determining whether the independent review standard of *Bose Corporation* applies to cases where

the district court judgment is in favor of the party asserting First Amendment rights. The Fifth (*Bartimo, Dunagin, Lindsay*) and the Eleventh (*Don's Porta-Signs*) Circuits have held that the independent review standard applies. The Seventh (*Planned Parenthood*) and Ninth (*Daily Herald*) Circuits have held that it does not apply. There is irreconcilable conflict among the circuits. Supreme Court Rule 17.1(a).

City's Misreading of Bose Corporation

The City had told the Eleventh Circuit that the "clearly erroneous" standard applies, but now seeks to support the Eleventh Circuit after the fact by asserting an unjustified reading of *Bose Corporation.* The City does not dispute the fact that all fourteen of the cases cited in *Bose Corporation* for independent review were decided in the court below *against* the party asserting First Amendment rights. Nor does the City dispute the fact that this Court has never sanctioned or undertaken an independent review of the facts in the record to ensure that the trial court did not afford the parties their First Amendment rights too broadly.

The City overlooks the rationale and constitutional underpinnings of *Bose Corporation.* For example, at pages 5-6 of its brief, the City quotes and underscores a portion of *Bose Corporation,* but fails to emphasize the important part of this Court's language: that "judges—and particularly Members of this Court—must exercise [independent] review in order to preserve the precious liberties established and ordained by the Constitution" and that "the Court has regularly conducted an independent review of the record book to be sure that the speech in question actually falls within the unprotected

category . . . in an effort to ensure that protected expression will not be inhibited."

The City ignores the rationale of *Bose Corporation* and the Supreme Court cases cited in petitioners' petition, primarily relying instead on the two Fifth Circuit cases, *Bartimo v. Horsemen's Benevolent and Protective Association,* 771 F.2d 894 (5th Cir. 1985), *cert. denied,* 475 U.S. 1119, 106 S.Ct. 1635, 90 L.Ed. 2d 181 (1986), and *Lindsay v. City of San Antonio,* 821 F.2d 1103 (5th Cir. 1987), *cert. denied,* ..... U.S. ....., 108 S.Ct. 707, 98 L.Ed. 2d 658 (1988). Like the City, *Bartimo* and *Lindsay,* however, ignored the rationale of or misunderstood *Bose Corporation* and other cases from this Court.

The City, purporting to rely on footnotes 16 and 29 from *Bose* and *Bartimo,* claims that appellate courts must "define the perimeter of [First Amendment] rights to *ensure that they are not abused,*" that is, not exercised too broadly (City Brief 8, 15). Neither the footnotes nor *Bartimo* provide any such support for federal appellate courts to police the exercise of First Amendment rights to ensure that they not be exercised too broadly.

The City also attempts to rationalize that the findings were mixed findings of law and fact (page 4), but the Eleventh Circuit was clear that it was applying an independent review standard not because there were mixed findings of law and fact, but because *Bose Corporation* applied (Appendix 56-a).

City's Arguments on the Factual Merits of the Ordinance

The City claims in footnote 5 at page 13 that petitioners fail to contest or even address the "substantive

issues" presented below.[1] The City is totally incorrect. This Court is primarily a court to review questions of law, rather than findings of facts. What petitioners challenge in this Court is the legal standard which the Eleventh Circuit applied.

City's Assertion That Denial of Certiorari Is Binding Precedent

The City places great emphasis on the fact that this Court denied certiorari in *Lindsay v. City of San Antonio,* 821 F.2d 1103 (5th Cir. 1987), *cert. denied,* ..... U.S. ....., 108 S.Ct. 707, 98 L.Ed. 2d 658 (1988) (City Brief 10). The denial of certiorari in *Lindsay* was not "notable" at all. First, *Lindsay* involved certiorari from the denial of a preliminary injunction, not from a final judgment. Second, the petition for certiorari in *Lindsay* was primarily fact oriented; here, the petition for certiorari is solely legally oriented.

The City suggests in footnote 8 at page 15 of the City's brief that this Court's denial of certiorari in *Dunagin, Lindsay,* and *Bartimo* "provides binding precedent for federal courts of appeal and district courts to follow." The City cites *Mandel v. Bradley,* 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed. 2d 199 (1977), but *Mandel* concerned summary affirmances and dismissals for want of sub-

---

1. The City claims that the ordinance contains exemptions for political and other non-commercial speech. Although the factual merits are beyond this petition, the exemptions for political signs are very narrow (Appendix 74-a-77-a), and even the Eleventh Circuit did not reverse the district court's finding that the regulations "single out the small businessman, non-profit organization and political candidate." The regulations would preclude a church, for example, from using portable signs for publicizing its Christmas and Easter services because Christmas and Easter are within 180 days (Appendix 124-a).

stantial federal questions, not denials of petitions for certiorari. Denials of petitions for certiorari clearly have no precedential effect. *Hopfmann v. Connolly,* 471 U.S. 459, 105 S.Ct. 2106, 85 L.Ed. 2d 469 (1985); *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 366 n.1, 93 S.Ct. 647, 650 n.1, 34 L.Ed. 2d 577 (1973); *Daniels v. Allen,* 344 U.S. 443, 497, 73 S.Ct. 397, 97 L.Ed. 469 (1953); *Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912, 919, 70 S.Ct. 252, 255, 94 L.Ed. 562 (1950) (Frankfurter, J.); *Sunal v. Large,* 332 U.S. 174, 181, 67 S.Ct. 1588, 1592, 92 L.Ed. 368 (1947); *House v. Mayo,* 324 U.S. 42, 48, 65 S.Ct. 517, 521, 89 L.Ed. 739 (1945). See Supreme Court Rule 17.1.

CONCLUSION

The very important legal questions concerning the applicability of *Bose Corporation* and the role of federal courts of appeal in First Amendment cases remain unresolved. As the cases from the Fifth, Seventh, Ninth and Eleventh Circuits indicate, those questions go far beyond portable signs. They should be resolved.

WHEREFORE, Petitioners would request this Court to grant the petition for writ of certiorari because the Eleventh Circuit decision conflicts with Federal Rule of Civil Procedure 52, precedent from this Court, precedent from other circuits, and the federal courts' historic role in protecting First Amendment rights.

PETER J. WINDERS
(Counsel of Record)
DONALD E. HEMKE
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH, CUTLER & KENT, P.A.
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioners

By: DONALD E. HEMKE

SUPREME COURT OF THE UNITED STATES

DON'S PORTA SIGNS, INC., ET AL. *v.* CITY OF CLEARWATER, FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-1176. Decided March 28, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This case presents the question whether the standard of review articulated in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984), applies to trial courts' findings of fact in cases striking down governmental restrictions on speech as contrary to the First Amendment.

The Federal District Court held in this case that a municipal regulation effectively banning portable signs violated the First Amendment. The court found that the regulation did not directly advance respondent's concededly substantial interest in aesthetics and that this interest could be served equally well by less intrusive measures. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557 (1980). The Court of Appeals for the Eleventh Circuit reversed. 829 F. 2d 1038 (1987). The appellate court interpreted our decision in *Bose* as mandating an independent examination of the whole record in all cases involving First Amendment claims. *Id.*, at 1053–1054, n. 9. Accordingly, the court concluded that it was not bound by the "clearly erroneous" standard in reviewing whether the regulation directly advanced respondent's aesthetic goals and was more extensive than necessary. The Eleventh Circuit's view that an independent examination of the record must be undertaken when a trial court has found a First Amendment violation, as well as when a trial court has rejected a First Amendment claim, is shared by the Fifth Circuit. See *Lindsay* v. *City of San Antonio*, 821 F. 2d 1103, 1107 (1987), cert. denied, 484 U. S. —— (1988).

Two other circuits have concluded, however, that *de novo* review is required only where the trial court has rejected a First Amendment claim. See *Daily Herald Co.* v. *Munro*, 838 F. 2d 380, —— (CA9 1988); *Planned Parenthood Assn./Chicago Area* v. *Chicago Transit Authority*, 767 F. 2d 1225, 1228–1229 (CA7 1985). These circuits have reasoned that no special solicitude need be accorded "the government's claim that it has been wrongly prevented from restricting speech." *Id.*, at 1229. Hence, if a trial court has held that the government unconstitutionally restricted speech, these circuits will review the trial court's findings of fact only for clear error.

I would grant certiorari to resolve this conflict among the Federal Courts of Appeals as to the standard of review to be applied to trial courts' findings of fact in cases holding that the First Amendment has been violated.